

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
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JOINT APPENDIX

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

BLAINE J. LORD :
EDYTHE M. KERBER, et al,

Appellants,
Cross-Appellees :

vs.

: Case No. 18,625

ROY T. HELMANDOLLAR, etc. :
BUREAU OF LAND MANAGEMENT,
SECRETARY OF THE INTERIOR STEWART:
L. UDALL,

Appellees
Cross-Appellants :

Case No. 18,680

8/8

APPEAL FROM JUDGMENT OR ORDER

CROSS-APPEAL FROM ORDER OF COURT TO VACATE
JUDGMENT

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United States Court of Appeals
for the District of Columbia Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 987-63

BLAINE J. LORD, et al, :
Plaintiffs, :
vs.)

ROY T. HELMANDOLLAR, etc., et al, :
Defendants. :

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs, jointly, complaining of defendants, allege:
1. This is an action for declaratory judgment under the
Declaratory Judgment Act (28 U.S.C.A., Section 2201) and for review
pursuant to the Administrative Procedure Act (5 U.S.C.A., Section
1001, et seq.).

FACTS UPON WHICH VENUE AND JURISDICTION ARE BASED

2. The venue and jurisdiction of this Court is founded upon the
provisions of Section 10 (b), 60 Stat. 237, 5 U.S.C.A. 1009.
3. The official residence of the Secretary of the Interior Stewart
L. Udall is Washington, D.C. Suit against head of federal agency, proper
venue is laid in district of his official residence where he performs offi-
cial duties. (Clement Martin Inc. v. Dick Corp. 97 F Supp 961).
4. Decision of the Secretary of the Interior, on administrative

appeal, was entered June 22, 1962. No appeal will lie in the Department of the Interior from the decision. (43 CFR 221.37).

5. The Bureau of Land Management and the Interior Department of the United States constitute "agency" within subsection (a) of Section 1009, 5 U.S.C.A. (Adams v. Witmer, 271 F 2d 29).

And officers of the Bureau of Land Management and those authorized within the Department of the Interior to review the officers' action . . . upon contests with respect thereto, does not preclude judicial review under Section 1009, 5 U.S.C.A. (Adams v. Witmer, *supra*).

6. As to plaintiffs, the amount in controversy exceeds exclusive of interest and costs, the sum and value of Ten Thousand Dollars (\$10,000).

THE PARTIES

7. The plaintiffs are:

(a) Blaine J. Lord and Edythe M. Kerber are citizens of the United States and are successors to the title, estate, interest, property and possession of all mining claims of Glenn Allen and Agness Allen and the Arizona Exploration Company, by conveyances in deed of July 12, 1961, recorded with the Pima County Recorder, Pima County, State of Arizona, in Docket 1806, page 520, on July 24, 1961; and are also successors to the title and interest of William M. Hazel in four placer mining claims thru Quit-Claim deed of February 1, 1960, recorded on February 6, 1961, with the Pima County Recorder, Pima County, State of Arizona, in Docket 1731, page 483.

All the mining claims referred to above are located in Section 19,

Township 12 South, Range 13 East, Salt River & Gila Meridian, in Pima County, State of Arizona, and are further identified as follows:

1. Canada del Ora, amended location 8-31-59, embracing NE 1/4 sec. 19, recorded in Book 1480, page 238;
2. Casas Adobe, located 7-20-59, embracing SE 1/4 sec. 19, recorded in Book 1461, page 26;
3. Catalina Foothills Estates, amended location 3-31-59, embracing lots 3, 4, E 1/4 SW 1/4 sec. 19, recorded in Book 1480, page 239;
4. Sufflok Hills, amended location 8-31-59, embracing Lots 1, 2, E 1/4 NW 1/4 Sec. 19, recorded in Book 1480, page 237.

All said mining claims are placer locations.

(b) Shirley Ann Allen, Joseph Allen Hazel, Joseph Evan Hazel, and Elizabeth Hazel Kendall were among the original locators of said mining claims, in association with Glenn Allen, Agnes Allen, and the Arizona Exploration Company, not formally incorporated.

8. The defendants are:

(a) Roy T. Helmandollar, individually, and in his capacity as Manager of the Phoenix, Arizona, Land Office, a federal government bureau under the Interior Department;

(b) Bureau of Land Management and United States Department of the Interior, federal agency of the United States government.

(c) The Secretary of the Interior Stewart L. Udall is federal government official, who rendered the final administrative decision.

(d) The State of Arizona is one of the states of the Union comprising the United States of America, Thru its State Land Department, the State of Arizona filed an application, Arizona 013986, for a state selection for Lots 1, 2, sec. 19, T. 12 S, R. 13 E., SR.&G. Meridian, Pima County, Arizona.

(e) Stanely C. Soho had filed on August 17, 1956, a Public Sale Application, AR 012116, for all section 19, Township 12 South, Range 13 East, Gila & Salt River Meridian, in Pima County, Arizona. At the hearing on March 16, 1960, of Contest No. 10379, involving the said mining claims, he was an intervenor.

(f) A. G. Jurko has lengths of barbed wire fence he left on said section long after his grazing lease had expired. His grazing lease had expired prior to locations of said mining claims. He is the same Andrew G. Jurko who owns the adjoining section, section 18, Township 12, South, Range 13 East, Gila & Salt River Meridian, in Pima County, Arizona. During the filing of said mining claims in Section 19, T. 12 S., R. 13 E., G. & S. R. M., Pima County, Arizona, and thereafter until about the beginning of the year 1960, he was the client of Hon. Stewart L. Udall, who was then United States Congressman in the 86th Congress from the Second District of Arizona and a member of the House of Representatives' committee on Interior and Insular Affairs, as shown by a communication from said Hon. Stewart L. Udall, dated October 8, 1959, addressed to Mr. Glen Allen, of the Arizona Exploration Company, which letter is hereto attached, identified as "Exhibit A", and made a part of this

action. The said Hon. Stewart L. Udall is the Secretary of the Interior, a defendant official of the United States Government in this action, whose administrative decision was rendered and entered in the administrative appeal involving said mining claims. The said A. G. Jurko appeared as an intervenor at the administrative hearing of Contest No. 10379, involving said mining claims, held on March 16, 1960. At such hearing, he represented that his interest in the land involved, as follows: "Some of the mining claims are located over the lands he owns." This was denied.

NATURE OF PROCEEDINGS GIVING RISE TO CONTROVERSY

9. Plaintiffs, and assignors of title of Blaine J. Lord and Edythe M. Kerber, filed locations for placer mining claims, to wit: Canada del Oro, amended location of August 31, 1959; embracing NE 1/4 section 19; Casa Adobe, located on July 20, 1959, embracing SE 1/4 section 19; Catalina Foothills Estates, amended location of August 31, 1959, embracing Lots 3, 4, E 1/4 SW 1/4 section 19; and Suffolk Hills, amended location of August 31, 1959, embracing Lots 1, 2 E 1/4 NW 1/4 section 19, - all in Township 12 South, Range 13 East, Gila & Salt River Meridian, in Pima County, Arizona, as association filing of ten persons. Said mining claims were filed under placer mining locations according to R.S. 2329, 2331 (30 U.S.C. section 35), in size and amount under R.S. 2330, (30 U.S.C. section 36), upon a public and unappropriated lands of the United States of America under R.S. 2319 (30 U.S.C. section 22). The prospecting and locating of said mineral claims were done by William M. Hazel,

a geologist, and Glen Allen, who had been engaged in mining and prospecting for twelve years in the State of Arizona alone. Within said mining claims were found and contained valuable mineral deposits consisting principally of magnitite iron, which is currently valuable and in demand, and other minerals such as vanadium, titanium, zirconium and a few other minerals.

10. From the time of posting the location notices, and of the filing thereof, of said mining claims, and at all times mentioned herein up to date, plaintiffs have been, and are, in continued actual physical possession of said public lands embraced by said mining claims, and in continued active and diligent search, exploration and development, in good faith, of said mineral claims, to establish the potential value of the mineral deposits and to meet the demand of technological discoveries and the newly found utility of the principal mineral depoists in said mining claims. As far as disclosed, the extent of the mineralization, the simplicity of extraction, the claims proximity to working mines and location in an established district of mining, the fact that extensive other magnitite placer claims exist in reasonable proximity, and the fact of a demand for sponge iron, and the improved and advanced methods of treatment and recovery of said mineral deposits, the marketability of such mineral deposits, and other like facts, warrant the further expenditure of money and efforts, with a reasonable prospect of success in developing a valuable mine.

11. Three months and 15 days after the filing of the locations of three of the four said mining claims, the defendant Roy T. Helmandollar, as manager of the said Land Office and officer of the agency of the United

States Government, filed an adverse contest against the plaintiff locators and said assignors, on December 15, 1959, in the United States Department of Interior, Bureau of Land Management, contest No. 10379, involving said placer mining claims, upon the following charges:

- 1) That no discovery of valuable minerals has been made on any of these claims;
- 2) That the land encompassed by these locations is non-mineral in character insofar as locatable minerals are concerned; and
- 3) That the mining locations were not made in good faith, were not located for mining purposes and are not being so used.

The said adverse proceedings, ostensibly brought by the said officer and agency of the United States Government, was not properly initiated upon valid reasons, nor to really enforce the public land laws, nor was it free from extraneous motives to assert the right of the Land Department of the government other than the interest of the United States and public weal, so as to place upon the said Contestant in said adverse proceeding a heavier burden of proof of its charges beyond *prima facie*. In partial support hereof, plaintiffs hereby make "Exhibit A", hereto attached, a part of this allegation.

12. On January 9, 1960, Contestees in said adverse proceedings, duly made answer, denied the Contestant's charges, and affirmatively alleged that:

- 1) A discovery of valuable mineral had been made on each and every one of the above claims;

- 2) The land encompassed by these locations is mineral in character insofar as locatable minerals are concerned; and
- 3) The mining locations were made in good faith, were located for mining purposes, and are being so used.

The position of the contestees was that, since said A. G. Jurko, whose long expired grazing lease was extinct and who let his old barbed fences remain unreasonably in said section 19, would not have been prejudiced in his rights by virtue of said mining claims, and did not affect the character of the land as being unappropriated public land open for exploration, location and discovery for minerals.

It was further the position of the contestees that they had complied with the statutory requirements of discovery and location, and, at such a time, it would not seem proper to place the initial burden upon the mining claimants to show the validity of their claims in a Government contest, but that the Government was required to make a *prima facie* case in such a contest against the validity of the mining claims therein involved.

13. Upon a notice dated January 27, 1960, the contestant in said contest proceeding notified contestees to appear before the Hearing Examiner on March 16, 1960, commencing at 9:30 A.M. at the Hearing Room, 199 Arizona State Office Building, 415 West Congress, Tucson, Arizona, for the purpose of receiving oral testimony, under oath, and documentary evidence, bearing upon any and all material issues in said action. Such hearing was to be held, according to said notice, under authority of 43 CFR, Part 221, Rules of Practice, Department of the Interior.

14. More than ten (10) days prior to said hearing, on March 4, 1960, contestants filed with the office of the Hearing Examiner a request for postponement of the hearing, all other parties duly served with copies of the request, on the grounds that, with due diligence made and pursued, contestants were hampered and prevented by various circumstances from obtaining and compiling the necessary evidence in support of the material matters in the defense of their case, and that their material witness, William Hazel, was then ill with asthma in North Carolina and could not attend the day of the hearing. The testimony of said witness would tend to show his negotiations with prospective mining developers toward the development of the mining claims in question, --which testimony would have substantially support their case. Such request for postponement of the hearing, contestants stated was not for the purpose of delay and that unless postponed for the reasons asserted would work great hardship and result in grave injustice to the said contestants.

Section 221.71, 43 CFR, Rules of Practice of the Department of the Interior provides that postponements of hearings will not be allowed except upon a showing of good cause and diligence.

The State of Arizona, intervenor, objected to the request for postponement on ground that "the grounds of the request to postpone hearing indicate that contestants are seeking time to make a discovery rather than time in which to prove a discovery heretofore made."

The contestant objected to postponement on the grounds that the existence of minerals and its marketability should have been made and

established upon the location of the claims, and that the illness alleged of witness was of common nature and no medical certificate offered, and because the United States had, it was alleged, "expended considerable time and monies in preparing for the hearing".

Neither the contestant nor the intervenor State of Arizona made or filed a statement within five (5) days after service of the request for postponement admitting that the witness on account of whose absence the postponement was desired would, if present, testify as stated in the request.

15. On March 9, 1960, the Hearing Examiner, Rudolph M. Steiner, made an order denying the request for postponement, on the ground that "Good cause therefor, within the meaning of 43 C.F.R., 221.71, not having been shown".

16. The Order by the Hearing Examiner denying the request for postponement was arbitrary, and unreasonable, within the spirit and meaning of administrative regulations, the statutes and mining laws, in that evidence relevant to the issues raised by the contestant involved not only the question of contestants' finding minerals in the placer claims, but also evidence relating to the present and prospective value of the mineral deposit, which necessarily includes numerous factors which could not be gathered and assembled by an ordinary prospector within such a short notice and accelerated proceedings to present their defense.

17. The denial of contestants' request for postponement of the hearing is contrary to the basic law of protection by the sovereign to which a miner or prospector is entitled to under the law.

18. The grounds advanced by the opposition to such request for postponement of hearing manifestly feared that given more time, the contestees would be in position to assemble all substantial evidence to prove discovery and location as would satisfy the stringent demands of such a contest, while, if contestees were rushed to the hearing proceeding at such an early date, the contestees would be caught at such a disadvantage that no matter how valuable was the mineral discovery they would fall short of proof.

19. That such arbitrary denial by the Hearing Examiner of the request for postponement of hearing could manifestly be inspired by the intervention in the case by the client of the defendant Secretary of the Interior Stewart L. Udall.

20. Postponment of the date of the hearing would not have prejudiced the contestants and intervenors, contestees having exercised diligence in making the request more than ten days, and the Hearing Examiner's denial of the request for postponement was an abuse of discretion.

21. The contestant alleged no facts or has shown no circumstances which warranted the bringing of the contest action at such an early date, and in an inopportune time, shortly following the filing of the certificate of location of said mining claims; and in rushing the hearing, objecting to postponement on the grounds that "the existence and marketability of any minerals which may be on the claims" should have been made and established upon the location of the claims, and requiring therefore, as the nature of the contest would have required, the mining claimants to

demonstrate commercial value at the time they made their initial discovery, the contestant entirely negated that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States, . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," R.S. 2319 (30 U.S.C. sec. 22), and the intent of the mining laws it totally frustrated. Manifestly, Congress must have intended that prospectors, miners, should have proper opportunity to unearth the mineral wealth in the earth, and did not contemplate that as soon as minerals are shown to exist, and at any time during exploration, the defendant government agencies to summon the mining claimants to show and demonstrate how remunerative were the minerals so discovered, or subject the mining claims to other disposition.

22. On March 16, 1960, at the opening of the hearing set by the Government, the contestees at said proceeding, by and through their counsel, renewed their request for the postponement of the hearing, repeating that they had not been given a reasonable time to prepare their case, that the reasonableness of time for preparation was to be determined by various factors. In truth, the filing of the contest at such non-customary time following the posting of location notices, and setting the day of the hearing just as early, inflexibly set, which was unmoved by any entreaty for postponement, although the administrative regulations accorded the contestees to one postponement, was no less a proceeding calculated to make short shrift of the contestees' mining claims, without recourse to reason or traditional justice, than arbitrary.

23. At such a hearing on said date above-mentioned, testimonies of witnesses for the Government and the contestee plaintiffs herein were taken, and based upon the evidence then introduced, the Hearing Examiner, on August 24, 1960, made a summary of the facts and rendered a decision, which shall be hereinafter referred to as "Decision, HE," to be followed by page or paragraph number. The Hearing Examiner held that "the contestant established, *prima facie*, that valuable minerals were not present on the claims in sufficient quantity to warrant a prudent man to invest his time and money in the hope of developing a paying mine." (Decision, HE, p.7). The defendant government agency, on February 17, 1961, and the defendant Secretary of the Interior, on June 22, 1962, respectively affirmed said decision.

24. To have established *prima facie* as such, the contestant should have presented sufficient proof in support of the essential elements necessary to prove a *prima facie* case, plaintiffs claim. One of these elements, the good faith of mining claimants, holds true in a government contest as in the consideration of patent applications. The good faith of a patent applicant and the use to which he has devoted the land or may intend to devote the land were proper elements to be considered in determining whether the land was of mineral character, so held the Land Department and the Department of the Interior. (Stanislaus Eletrect Power Co., 41 LD 655, United States v. Moorhead, 59 ID 192). The good faith of the contestee plaintiffs herein was impugned by the Government in its allegations in said contest. The Hearing Examiner, however,

conclusively found and determined that the Government has not sustained by its evidence its allegation as to lack of good faith in the mining claimants and that "There is no evidence of any actual consequential use of the subject lands for purposes other than mining." (Decision, HE, p. 6, par. III). By the reason thereof, the decision of the administrative agency was unsupported by substantial evidence and not in accordance with law.

25. The Government by its own witness, Luther S. Clemmer, duly qualified mining engineer, established that from October 8 (1959) when the witness examined the lands in question, and progressively therefrom, the following improvements were made and were being made in the claims in question, to wit: There were some roads. The fence cut at four points, each about a tenth of a mile wide, and at these points roads had been cleared with blades of tractor. There was a clearing, an area 50 feet by 100 feet, up a knoll on the Casas Adobe claim. On the southeast corner of said claim a drilling rig was drilling a well. (Well-driller's testimony stated that he went to 350 feet deep and hit water at 250 feet deep and pumped 400 gallons a minute). Then said government witness saw a trailer moved to the northeast corner of said claim, and another at a later date on the southeast corner, and small trailers near Thornydale Road. On his December inspection, he noticed another area had been cleared just north of the quarter corner about 150 feet west of the road on a knoll. Also, he said, "there had been quite a large area cleared, about . . . 250 feet by 100 feet in width," Then, witness and his companions noticed "small pits down this large wash and across the south

half of this section" (Section 19 in question), indicated in Contestant's Exhibit 12, and "tire tracks of vehicle about every 100 yards going west for about half a mile where it appeared that, probably, small amounts of material had been removed." Witness also stated that there were four-by-four posts which were mining location monuments with cans fastened on containing the location notices for these various claims. By then, he saw that the well was completed and had a concrete cap on. Witness further testified to the presence of a "motor, gas-driven generator, evidently for power to operate the pump in the well, and "100 feet northwest of the well, north by northwest, . . . there are four concrete footings that have been poured and there is a large wilfley-type table, about five by ten or something like that, near these concrete footings." The witness identified photographs handed by contestant's counsel showing some of the improvements testified to, and admitted in evidence. (Trans. pp. 38 to 43). The Hearing Examiner so found in his summary of the facts. (Decision, HE, p. 2, par. I). Plaintiffs claim that the foregoing improvements were development or exploration work being then performed by the mining claimants consistent with the provisions of the statute, and the intent of Congress, that "all valuable mineral deposits in lands belonging to the United States . . . are declared to be free and open for exploration . . ." (R.S. 2319, 30 U.S.C. sec. 22). Contestees at the contest proceeding claimed that it would be of great hardship, if not nigh impossible as well as nugatory, if after the discovery of valuable mineral deposits and the work of unfolding its extent and scope,

and before any returns could come in, the mining claimants were required to appear before the administrative examiner to give an account of the commercial value of the minerals found and of the profits they would bring. The action of and the decision by the administrative agency is arbitrary, without warrant of substantial facts and of law, and by reason of them the investment in money, time and effort, and the property rights, of the plaintiffs shall be lost, without adequate remedy at law.

26. The contestant, in said aministrative proceeding, charged that no discovery of valuable minerals has been made on any of these claims; that the land encompassed by these locations is non-mineral in character insofar as locatable minerals are concerned.

The Hearing Examiner, in his findings of fact, found that minerals had been shown to be present on the subject claims, the most important of which was magnetite. (Decision, HE, p. 6, par. III, p. 2 and p. 3). Such findings were based upon the testimony and evidence of Government witnesses. Witness Luther S. Clemmer, Evaluation Engineer in Mining, Bureau of Land Management, stated as to ths subject lands' "Miner-
alogy, there are present in the alluvium some black sands referred to as heavy minerals which our testing showed to be present." (Trans. p. 35). According to the witness, the materials were of genetic character, that is, of igneous rocks which "composed of various minerals, magnetic iron, magnetite, sphene and chlorite and all sorts of things". (Trans. p. 37). The composition of the mountains close by the subject claims are of these materials which were carried down and formed the

alluvial deposits where "Of course the heavier materials tend to be sort of concentrated along the washes and the lighter materials tend to move on a little further." (Trans. p. 37). Government witness, Dr. Willard Carlton Lacey, stated, "In his opinion the only mineral of any value found in the sample was magnetite." The sample contained 1.10 to 1.25% magnetite. (Decision, HE, p. 3). The samples tested by Mr. Clemmer and Mr. Henry Ash, another government witness, contained .8. to 1.38% iron, valued at 20.8 to 47.6 cents per cubic yard of sand. (Decision, HE, p. 3.). "Mr. Clemmer then testified that the salable minerals in the subject deposit had a theoretical gross value of 38.4 to 47.4 cents per cubic yard." (Decision, HE, p. 3. 4.). Thus the Government showed that the subject claims are in fact mineral in character and contained valuable minerals. The findings of the Hearing Examiner and the evidence confirmed the claims and the evidence of the mining claimants that the land contained minerals and are valuable and that they made a valid discovery under the law.

27. The Hearing Examiner, summarizing the testimony of the contestants, found that Glenn Allen "testified that he has been engaged in mining and contracting for the past 11 years. Most of his work has been in connection with uranium, gold and copper in Southern Arizona. For the past 2 years he has been staking claims and testing and working with iron ore in Pima and Pinal Counties. He stated that he has probably staked about 1,000 claims for himself and other people. The largest

deposit is located in Pinal County covering approximately 150 sections and containing mostly magnetite. He first examined the subject claims about a year and a half before the hearing while searching for magnetite or other valuable ore. He found magnetite and garnet exposed on the claims and subsequent tests revealed the presence of vanadium, titanium, zirconium and a few other valuable minerals. He stated that any mining operation would commence in the washes with a dredging or dry separation method being used. He had experience with dredging in New Mexico and was acquainted with other dredging operations in the United States. He estimated that dredging costs would be less than 30¢ a yard. A suction dredge could be operated at 10 to 15¢ per yard. He referred to a new prototype dry operation which would cost about 23 to 25¢ a yard. He stated that magnetite for use as a heavy media for a sink-float could be sold in Japan. It could be used in oil fields for drilling mud and in a new process for the production of steel. Magnetite would be suitable for ordinary iron processes if it were pelletized. The garnet could be used as abrasive and sold at 22¢ a pound. He stated that the eastern half of Section 19 has been leased to various individuals who subsequently entered into a partnership agreement relative to the development of the said section for mining purposes. A concentration table has been set up on the claims. The well was drilled on the claims to produce sufficient water to justify a wet separation process. At present, the well will pump about 28 gallons a minute but it has the capacity to produce a lot more water. It was his plan to set up a pilot operation to

prove the economic feasibility of mining and extracting valuable ores.

He had excavations on the claims as deep as five feet and observed therein layers of black minerals as much as one-half inch thick."

(Decision, HE, p. 4). James Concannon, engaged in mining business, extracting minerals by gravity process, testified that samples brought by one of the contestants, Mr. Kerber, after a test-run, found 25% of the samples consisted of black sands mineral. Samples of the concentrates which he had separated by a dry gravity process were introduced in evidence. (Decision, HE, p. 5; Trans. pp. 265 - 271). He testified further that most of the mines, particularly in the Arizona district area, may be considered low grade ores, and that these mines are making a profit. (Trans. pp. 272 - 273).

By reason of the foregoing facts established by the Government and those by the mining claimants, the contestants in said contest proceeding duly proved a valid discovery of valuable minerals under the statute and the laws.

28. By reason of such foregoing facts so found and in evidence, the decisions of the examiner and of the appeals officer of the defendant administrative agency that no valid discovery of valuable minerals deposits were made on the subject claims are not supported by substantial evidence and are contrary to law; and that the findings and decision of the Secretary of the Interior declaring that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor

and means, with a reasonable prospect of success, in the development of the claims, is manifestly unsupported by substantial evidence on the record as a whole, capricious, and without warrant of law.

29. Upon the facts as found by the Hearing Examiner, the only question presented to him to determine was whether, where deposits of minerals has been found in the subject claims and where said deposits of minerals carry valuable minerals such as magnetite and others, and when these two elements taken together, is such that, because of the results of the assays produced at the hearing and concentrates resulting from a dry gravity process introduced in evidence, would have justified an ordinary prudent man in going ahead with the development of the claims.

The Hearing Examiner, upon determining such issue, stated, to wit: "The results of these quantitative analyses show that the theoretical value of the recoverable minerals present is far exceeded by the costs of the recovery and marketing thereof." Upon this, the examiner concluded, on the theory of the prudent man test, that the mining claims were null and void for lack of valid discoveries of valuable mineral deposits.

In consequence thereof, it is manifest that the Hearing Examiner, by applying the "prudent man" test rule upon evidence consisting of demonstrable commercial value and marketability, was so confused and misapplied the "prudent man" test rule.

30. By reason of the foregoing determination, affirmed by the Appeals Officer, the administrative decisions are capricious, in that they are inconsistent and contrary to the well-settled decisions by both

the defendant administrative agency and the Secretary of the Interior that discovery in order to be valid need not be of ore of commercial quantities or of quality which will yield a profit. Further, the decision, and that affirming it, is not supported by substantial evidence on the record as a whole, and is without warrant of law.

31. The Hearing Examiner "was persuaded that the costs of recovery by conventional methods estimated by the contestant's witnesses are reasonably accurate" (Decision, HE, p. 7); it is not that the costs of recovery as estimated were not accurate, but that the examiner was persuaded that such costs of recovery estimated by contestant's witnesses, as, for one, that of Dr. W. C. Lacey's, were estimates arrived at upon values from assays of samples which witness took from materials dug out of a well drilled in one of the claims in question, and, therefore, plaintiffs declare, are not probative of values of the minerals, in placer claims, in the subject location claims; and, as, for two, that of Henry Ash's (who testified that he believed "that true samples of this material could be gotten in cutting", but notwithstanding did not secure his samples that way (Trans. p. 164), although Glenn Allen, one of the contestees, "had excavations on the claims as deep as five feet and observed therein layers of black minerals as much as one-half inch thick" (Decision, HE, p. 4, last sentence)), were estimates arrived at upon values from assays of samples not properly and fairly obtained, and, therefore, represented not true values as they were derived from not "true samples", the witness knowing so; and, as, for, three, that of Luther S. Clemmer's (who, although

he admitted that "Mr. Allen made the statement that if he did start mining it would be no doubt in the wash because of the higher concentration of heavier materials, avoided sampling the washes, except for only one which assayed high) were estimates arrived at upon values from assays of samples obtained without due care and circumspection of circumstances pertaining to placer mining locations, and, therefore, plaintiffs declare, are not sufficient probative values of the minerals discovered in the subject placer mining locations.

32. Where experience' testimony that recovery costs would be lower than the contestant's estimates if a suction dredge, or a new prototype dry operation, were used, has been taken for granted by the Hearing Examiner (Decision, HE, p. 7) as "highly conjectural", as against the "conventional" (Decision, HE, p. 7) "shovel and truck operation" as the "most economical way of handling" the small mining operation, in the opinion of Professor William Carlton Lacey (Trans. p. 89 - 90), whose personal qualifications did not include shovel and truck working experience, and would thereby entail an operation cost of \$466,000 per acre and would "end up with a net estimated loss of \$406,000 per acre", without basis of fact at all apparent in any form, (Trans. p. 89 - 90), such determination by the Hearing Examiner is arbitrary and unreasonable, and an abuse of discretion.

Such determination by the Hearing Examiner involved the presumption that the one offering the latter opinion has a Ph.D. degree, while that of the former by one with a formal education beyond the modos

operatori of experience, and therefore is worthy of credit. (Decision, HE, p. 5, first two lines).

33. The said contestees went to the said hearing on March 16, 1960, expecting to meet the charges alleged in the contestant's complaint and reasonable evidence under the "prudent man" test. The contestant introduced evidence concerning commercial value of the minerals found in the subject claims and marketability and profitability. The examining officer's decision was based upon the consideration of these matters. At the time of the hearing, the contestees renewed their earlier written request for continuance of the hearing to allow them time to prepare their defense. Again the hearing officer denied the request. In the appeal to the Secretary of the Interior, in a motion supported by affidavit, contestees asked for leave to present additional evidence on the grounds that insufficient time was given them in which to prepare properly for the hearing and that new evidence not available at the time of hearing, which they sought to introduce, would tend to prove that the production and sale of some of these minerals in local markets, and the fact of the cost of extracting the minerals, shall not be as high as claimed by the Government witnesses. The evidence would have been in rebuttal to the unexpected opinion testimony introduced by the contestant on those matters. The motion was denied, on the ground that "If the motion to produce additional evidence not in existence at the time of the hearing was granted, further hearing before an examiner at which all parties were represented would be required. (Citations). Such action is not taken in the absence of

a substantial claim to equitable consideration on the part of the petitioners."

The decision also claimed that nothing in the record suggested that there was an equitable basis for reopening the hearing. (Decision, Secretary, p. 3)

Facts and circumstances, as basis for equitable consideration, exist on the record. Further, the Secretary of the Interior, as individual, as attorney for Andrew G. Jurko, who intervened at the hearing, personally knew, at all times herein mentioned, certain basis of facts that would have called for fair, just and right dealing and for giving the contestees all the opportunity to present all evidence and matter of defense which they considered important to their case. The breadth of administrative discretion places in a strong light the necessity for maintaining in its integrity the essentials of a fair play and of impartiality. By reason of such denial of the motion to present additional evidence, contestee plaintiffs were denied due process of law under the Fourteenth Amendment to the Constitution. Plaintiffs, further, assert that the decision of the Secretary of the Interior was a compromise on the footing of convenience or expediency, or because of a desire to be rid of harrassing delay, and thereby it ignored and denied to the contestee plaintiffs the right to a fair and impartial hearing guaranteed to every litigant by the Fifth Amendment to the Constitution, and denied the plaintiffs the essential demands of justice.

34. The subject claims are on public land, among sections of undeveloped arid tracts. The hearing examiner found that the subject lands

were being used for no other purpose than mining, and located in good faith. He further found and the evidence exist on the record that the land contains valuable minerals. Notwithstanding, the adverse decision was mainly inspired and compelled by an irresponsible agitation aroused by western land speculators, and so made as a deterrent against an imagined fear that some other persons might file mining claims on sections of undeveloped private property which might offer speculative potentials in the land boom in Arizona. For this reason, the action and decision of the defendant agency is without warrant of law, and it is an abuse of discretion.

35. The action and decision of the defendant administrative agency is unconstitutional and is null and void, for the following reasons:

a) Discovery of valuable minerals and valid location having been duly made, the property of the plaintiffs is being taken from them without due process of law in violation of the Fifth Amendment to the Constitution of the United States (Amendment V, U.S. Const.)

b) It denied the plaintiffs fair hearing and the full opportunity to present all the evidence which they deemed important in their defense, in violation of the due process clause of the Federal Constitution (Amendment V; Amendment XIV, Sec. 1)

c) It is not impartial, as required under the due process clause of the Federal Constitution (Amendment V; Amendment XIV), where the litigants in the administrative tribunal of the administrative agency in which the superior officer has a direct, active and pecuniary interest in the

outcome of the litigation, and where in the administrative appeal to the Secretary of the Interior, the Secretary, as individual, has a direct and pecuniary or professional interest in the determination and in the outcome of the case.

36. The amended location claims in question were filed on August 31, 1959. On October 6, 1959, Mr. Luther S. Clemmer, Evaluation Engineer of the Bureau of Land Management, accompanied by Andrew G. Jurko, who had been in communication with the Land Management and with Hon. Stewart L. Udall, examined the subject lands. (Trans. p. 29). In a letter, dated October 8, 1959, addressed to Glen Allen, United States Congressman Stewart L. Udall, acting for his client Andrew G. Jurko, protested against the filing of the mining claims on the subject lands and warned that he shall have the law observed. At the time, and thereafter until January 21, 1961, Hon. Stewart L. Udall was a member of the House Committee on Interior and Insular Affairs. His client, Andrew G. Jurko, at all times mentioned herein, claimed he "owns" the subject land of the mining claims in question and continued to do so, and on April 7, 1963, threatened plaintiffs' workmen with trespass and threatened to seize the equipment and improvements belonging to plaintiffs. Thereafter said letter, dated October 8, 1959, (Exhibit "A"), Hon. Stewart L. Udall, actively urged on some action against the subject claims and toward their nullification. On December 15, 1959, the contestant filed a contest in the Bureau of Land Management at Phoenix, Arizona.

On January 27, 1960, the Hearing Examiner of said bureau set a hearing for March 16, 1960. Since the beginning of the year 1960, Hon. Stewart L. Udall was actively campaigning in the State of Arizona and at political rallies or group meeting spoke against the subject mining claims and what he was going to have done with them. The Hearing Examiner, as is the appeals officer, is a subordinate officer in the Department of the Interior, which is under the jurisdiction and the concern of the House of Representatives Committee on Interior and Insular Affairs. At the hearing on said contest on March 16, 1960, Andrew G. Jurko intervene. Contestees objected and opposed his intervention on the ground that his grazing lease had long expired and had no legal interest in the subject land. It was claimed for him that some of his old fence was on said land. In the decision by the appeals officer in the Department of the Interior, it was stated that the locations conflicted in part or in whole with certain applications on file but also with "a grazing lease of Mr. Jurko". (Decision, Director, p. 1). Said decision was rendered February 17, 1961. Month before, on January 21, 1961, Hon. Stewart L. Udall was sworn in as Secretary of the Interior. The Secretary of the Interior is the head of the Department of the Interior. (R.S. Sec. 437, 5 U.S.C. 481). Under the statute, the Secretary is "charged with the supervision of public business relating to the following:" the public lands, including mines, and the Bureau of Land Management and Bureau of Mines (as amended June 17, 1957). When the contestees had to appeal to the Secretary of the Interior in accordance with 43 CFR. Part 221, as

amended, as stated in the decision of the appeals officer, and to the time the Decision of the Secretary of the Interior on June 22, 1962, Hon.

Stewart L. Udall was the Secretary, the head of the Department of the Interior, and the superior officer. Secretary Stewart L. Udall, as individual, at all times mentioned herein, has a direct and pecuniary interest in the outcome of the contest against the subject mining claims, and his actions and utterances in the press and at public appearances has been adverse to the said mining claimants. For these reasons and circumstances, the said hearing and the appellate proceedings were not fair and impartial. The requirements of fairness and impartiality in a hearing in the administrative department are not exhausted in the taking of or in the consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

From the inception of the administrative contest proceedings to its termination, contestee plaintiffs have been denied, and did not have a fair and impartial hearing, and denied the due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Plaintiffs have been deprived of their property rights and of their substantial rights for which they have no adequate legal remedy. And, further by reason of the foregoing facts, plaintiffs are imminently threatened with great and irreparable damage and injury to their property and their property rights for which they have no adequate legal remedy.

37. That there exists between each of the plaintiffs and each of the defendants herein an actual, judicable controversy in respect of which the plaintiffs need a declaration of their rights, involving their rights of valid discovery and location of valuable mineral deposits under the mining laws and their rights to due process under the Constitution of the United States, for which plaintiffs have no other relief available except by the relief sought herein.

WHEREFORE, the plaintiffs pray:

- (a) That the action of the defendants administrative agency, their decisions, and that of the Secretary of the Interior be declared unconstitutional, illegal, and null and void;
- (b) That the decisions of the hearing examiner, the appeal officer of the Department of the Interior, and of the Secretary of the Interior be set aside and held for naught;
- (c) That the discovery of valuable minerals and locations of the subject mining claims in the public land of the United States in Section 19, Township 12 South, Range 13 East, G. & S.R. Meridian, in the State of Arizona, be declared valid;
- (d) That the Department of the Interior be required to certify and file with this Court a transcript of all and complete record in the proceedings before said administrative agency;
- (e) That this Court, pending the final determination of this cause, a temporary restraining order or a preliminary injunction or both, be issued and granted, restraining and enjoining the defendants and each

of them from taking any further action with regards to said lands and
mining claims in question or any further dispositions thereof; and

(f) For such and further relief as to the Court may seem just
and proper.

Blaine J. Lord

Edythe M. Kerber

Plaintiffs.

JOSE DEL CASTILLO, Esq.
Attorney for Plaintiffs

CORNELIO O. LOPEZ, Esq.
Attorney for Plaintiffs

Filed: April 16, 1963

EXHIBIT A

Udall & Udall
222 Court Avenue
Tucson, Arizona

October 8, 1959

Mr. Glen Allen
c/o Arizona Exploration Company
1904 S. Norris
Tucson, Arizona

Dear Mr. Allen:

We represent Mr. Andrew G. Jurko who is the owner, under U. S. Patent No. 1077323 of the following real property:

Lots one, two, three, and four, the east half of the west half, and the east half of Section eighteen in Township twelve south of Range thirteen east of the Gila and Salt River Meridian, Arizona, containing six hundred eleven acres and forty-four hundredths of an acre.

Mr. Jurko advises us that you and your associates have located, or attempted to locate, a placer mining claim on his property. We assume that, in this instance, you acted under the Stock-Raising Homestead Act of December 29, 1916.

You are hereby advised that our clients are fully advised of their rights under the Act of December 29, 1916, and subsequent amendments, and intend to insist that the letter of the law be observed in every respect where their rights are concerned.

Consequently, you are hereby advised that if you or your associates intend to re-enter the property of our clients for legitimate mining purposes such re-entry will be unauthorized unless you post the bond required by the Act of December 29, 1916 or otherwise comply with the strict provisions of this Act.

Very truly yours,

Udall & Udall
Signed by Stewart Udall

Filed: April 16, 1963

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS,
ROY T. HELMANDOLLAR, INDIVIDUALLY AND AS
MANAGER OF THE PHOENIX ARIZONA LAND OFFICE,
BUREAU OF LAND MANAGEMENT, AND STEWART L.
UDALL, THE SECRETARY OF THE INTERIOR.

The defendants, Roy T. Helmandollar, Manager of the Phoenix, Arizona, Land Office, Bureau of Land Management, and Stewart L. Udall, Secretary of the Interior, by their attorney, move the Court for summary judgment of dismissal. The reasons for this motion are as follows:

1 - The complaint fails to state a claim upon which relief can be granted.

2 - There is no genuine issue of any material fact and the defendants are entitled to judgment as a matter of law.

This motion is based upon the pleadings heretofore filed in this case and the following decisions of the Department of the Interior referred to in the complaint, true and correct copies of which are attached as exhibits to this motion:

(a) Decision dated August 24, 1960, by Hearing Examiner Rudolph M. Steiner, in Contest No. Arizona 10379,

(b) Decision dated February 17, 1961, by A. H. Furr, Appeals Officer, Bureau of Land Management, Department of the Interior, in Contest No. Arizona 10379,

(c) Decision dated June 22, 1962, by Deputy Solicitor Edward W. Fisher, on behalf of the Solicitor of the Department of the Interior, No. A-28876, in Mineral Contest No. Arizona 10379.

The foregoing motion also is based upon the entire administrative record of the Department of the Interior, consisting of file

No. Arizona 10379, which is attached to this motion.

Respectfully,

Herbert Pittle
Attorney for Defendants.

Filed: July 1, 1963

STATEMENT BY DEFENDANTS, HELMANDOLLAR AND
UDALL, OF MATERIAL FACTS AS TO WHICH THERE
IS NO GENUINE ISSUE IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT.

Pursuant to Rule 9(h) of the Rules of this Court, the defendants, Helmandollar and Udall, submit in support of their motion for summary judgment the following statement of material facts as to which there is no genuine issue:

1. On December 15, 1959, the United States filed a contest against certain mining claims described in the complaint, charging that the claims were invalid because no discovery of valuable minerals has been made on any of the claims, that the land encompassed by the locations is nonmineral in character insofar as locatable minerals are concerned, and that the mining locations were not made in good faith, were not located for mining purposes, and are not being so used.

2. The plaintiffs, the contestees in the above proceeding, filed an answer denying generally those allegations. After a hearing on the charges, the Hearing Examiner of the Bureau of Land Management decided that the land upon which the claims were located did not contain

valuable minerals in sufficient quantity to warrant a prudent man investing time and money in the hope of developing a paying mine. The Hearing Examiner, on August 24, 1960, decided that the claims were null and void because a discovery of valuable mineral deposits had not been made within the meaning of the mining laws of the United States. 30 U.S.C. 22.

3. Upon appeal from the Hearing Examiner's decision, the Appeals Officer of the Department of the Interior affirmed the decision on February 17, 1961.

4. The decision of the Appeals Officer was affirmed on behalf of the Secretary of the Interior by the Deputy Solicitor on June 22, 1962.

5. Copies of the decisions by the Hearing Examiner, the Appeals Officer and the Secretary of the Interior attached to the defendants' motion for summary judgment are true and correct copies and contain discussions of the evidence which was adduced at the hearing, considered by the Department of the Interior, and contain citations of court decisions relied upon by the Department of the Interior to support the decisions.

Respectfully,

Herbert Pittle
Attorney for Defendants,

Filed: July 1, 1963

AFFIDAVIT OF ERNEST F. HOM

ERNEST F. HOM, being duly sworn, deposes and says that he is the Assistant Solicitor, Land Appeals, in the Office of the Solicitor, Department of the Interior, and that the attached file, Mineral Contest No. Arizona 10379, and the attached Transcript of Proceedings, consisting of two volumes and exhibits, constitute the entire administrative record before the Secretary at the time the appeal to the Secretary in the case of United States v. Arizona Exploration Company et al., A-28876, was decided.

(Sgd.) Ernest F. Hom

NOTICE OF TAKING DEPOSITION

TO: THE DEFENDANTS, AND ATTORNEYS OF RECORD; ANDREW G.

JURKO, and ELY, DUNCAN & BENNETT, his attorneys:

You and each of you will please take notice that 10:30 A.M. on the 2nd day of August, 1963, at the Law Offices of Emojean Girard, Suite 411, Phoenix Title Building, at North Church Avenue and West Alameda, Tucson, Pima County, Arizona, the plaintiffs in the above entitled action will take the deposition of defendant Andrew G. Jurko, whose address is 5262 North Genematas Drive, Tucson, Arizona, upon oral examination pursuant to the Federal Rules of Civil Procedure, before a qualified Notary Public, or before some officer authorized by law to administer oath. The oral examination will continue from day to day until

completed. You are invited to attend and examine.

Dated this June 9, 1963, at Tucson, Arizona.

Jose del Castillo

By JOSE DEL CASTILLO
Counsel for the Plaintiffs.

Filed: July 15, 1963

JOINT MOTION OF DEFENDANTS ROY T. HELMANDOLLAR,
STEWART L. UDALL, AND A. J. JURKO FOR AN ORDER
UNDER FED. R. CIV. P. 30(b) STAYING THE TAKING OF A
DEPOSITION NOTICED BY PLAINTIFFS.

Defendants Helmandollar, Udall, and Jurko move this court for an order under Fed. R. Civ. P. 30(b) staying the taking of the deposition of defendant Jurko noticed by plaintiffs for August 2, 1963 in Phoenix, Arizona.

The ground for this motion is that defendants Helmandollar and Udall on June 28, 1963 filed a motion for summary judgment in this action; and on June 12, 1963 defendant Jurko filed a motion to dismiss this action as against him on the grounds of improper venue and service of process. These motions have not yet been set down for oral argument. Moving defendants submit that no useful purpose could be served in the taking of defendant Jurko's deposition prior to a determination of these motions; and that the taking of this deposition at this stage of the litigation will merely result in undue harassment, annoyance, and expense.

to the moving defendants.

Respectfully submitted,

Dated: July 19, 1963

S/ _____
Herbert Pittle
Attorney for Defendants
Helmandollar and Udall

S/ _____
Elmer F. Bennett
Attorney for Defendant Jurko

Filed: July 19, 1963

OPPOSITION TO JOINT MOTION OF DEFENDANTS ROY T.
HELMANDOLLAR, STEWART L. UDALL, AND A. J. JURKO
FOR AN ORDER TO STAY TAKING OF DEPOSITION OF
A. J. JURKO NOTICED BY PLAINTIFFS

Plaintiffs hereby respectfully oppose and object to the above defendants motion for order to stay the taking of the deposition of A. J. Jurko which has been noticed for August 2, 1963, at Tucson, Arizona, in the Phoenix Title Building on the following grounds:

1. The motions of said defendants since the filing of the complaint and the filing of the notice of said taking of deposition have raised in issue as to the existence of certain material facts and also as to whether there is an issue of fact to be determined by the Court on the matter of the motion of defendants Helmandollar and Secretary Udall for summary judgment, and thereby made imperative and necessary the taking of the

deposition of A. J. Jurko for plaintiffs' opposition to said motions in answer.

On April 16, 1963, this action was commenced and in the complaint, plaintiffs have alleged facts tending to show that plaintiffs were denied a fair and impartial hearing below in the administrative proceedings, from the beginning to the final appellate stage, because Secretary Udall has a direct and pecuniary or professional interest, in that intervenor A. J. Jurko was and has been his client, introducing a piece of documentary exhibit as part of the allegation.

On June 12, 1963, filed a motion to dismiss the action against him based upon improper venue and service of process. Plaintiffs have alleged in the complaint that he intervened in the proceedings below in the administrative contest. By the use of the rules on discovery and deposition, plaintiffs could properly controvert and defend their position by other and additional facts which may be elicited from said A. J. Jurko himself, and therefore, it is material and necessary in formulating plaintiffs' defensive opposition to said motion to dismiss as to said Jurko.

On June 28, 1963, defendants Helmandollar and Secretary Udall filed a motion for summary judgment on the grounds that there is no genuine issue of any material fact and that moving defendants are entitled to judgment as a matter of law. Defendants thereby raised the issue, for the determination of their said motion, of whether there is any genuine issue of a material fact. By proper allegations of facts, plaintiffs contend and claim that they had been denied fair and impartial

hearing below in the administrative proceeding because of the business and professional relationship between Stewart L. Udall, while as United States Congressman member of the Committee on Interior and Insular Affairs and subsequent and during the appeal in the administrative proceeding was Secretary of the Interior and as such head of the Department of Interior have inspired as well as determined the actions and decisions throughout the administrative proceedings. The question of whether plaintiffs have not received a fair and impartial hearing below, and, therefore, under the law and due process provisions of the Constitution, the said proceeding and action of the defendants agency be declared null and void by the Court, depends upon the existence of the ultimate fact alleged by the plaintiffs. Additional and material matters necessary to establish the case for the plaintiffs are in the possession of said A. J. Jurko, who could shed light further on the question why plaintiffs did not get a fair and impartial hearing below. Plaintiffs seek, through discovery procedures, to elicit from A. J. Jurko pertinent and material facts on said issue, which is raised and put before the Court prior to trial by the said defendants' motion for summary judgment. For these reasons, the taking of the deposition of A. J. Jurko should come and be allowed before the hearing of oral arguments on the motions to dismiss and for summary judgment filed by said defendants.

2. Should the motion by A. J. Jurko for an order to dismiss the action as against him prospers, still the matters, which

plaintiffs seek to get from him by and through his deposition, could be used and is necessary for plaintiffs' use in the preparation of their defense against the motion for summary judgment.

3. Upon the facts and circumstances in the case at Bar, the cases cited by defendants in their motion to stay the taking of said deposition scheduled for August 2, 1963, has no application.
4. No facts have been presented by movant defendants as to how or why the mere taking of A. J. Jurko's deposition would "result in undue harrassment, annoyance, and expense" to them. And there is not any legal presumption that it does.
5. Rule 26 (a) gives a broad right to any party to take the testimony of any person, including a party, by oral deposition, pursuant to Rule 30, for the purpose of discovery or for use as evidence in the action or for both purposes. And deposition taking may begin at an early stage in the action.

Respectfully submitted,

Jose del Castillo
JOSE DEL CASTILLO,
of Plaintiffs Counsel

Filed: July 31, 1963

Order staying taking of deposition of A. G. Jurko until a date after October 20, 1963 to be noticed pursuant to Federal Rules of Civil Procedure

Filed: August 6, 1963

NOTICE OF CROSS-MOTION
BY PLAINTIFFS FOR SUMMARY JUDGMENT

TO: ROY T. HELMANDOLLAR, AND SECRETARY STEWART L. UDALL, defendants, and HERBERT PITTLER, Esq., attorney for defendants:
Room 2136, Department of Justice
Washington, D.C.

PLEASE TAKE NOTICE that upon the pleadings herein and upon all the papers served by you on the 28th of June, 1963, whereby you gave notice of motion for summary judgment for defendants Helmandollar and Udall and upon the annexed affidavits, verified statements, and record, the undersigned will make a cross-motion upon the argument of your said motion in the United States District Court For The District of Columbia, Washington, D.C., on the 11th of September, 1963, at 9:45 A.M. o'clock or as soon thereafter as counsel can be heard, that this Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor where the facts warrant that plaintiffs, the adversary party to said motion for summary judgment, are entitled to a summary judgment to be entered in their favor as a matter of law.

Dated August 23, 1963

Jose del Castillo
JOSE DEL CASTILLO
Counsel for Plaintiffs

Filed: August 27, 1963

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY
DEFENDANTS ROY T. HELMANDOLLAR, INDIVIDUALLY
AND AS MANAGER OF THE PHOENIX, ARIZONA LAND OFFICE,
BUREAU OF LAND MANAGEMENT, AND STEWART L. UDALL,
THE SECRETARY OF THE INTERIOR.

The plaintiffs herein respectfully object and oppose the motion for summary judgment filed by defendants Roy T. Helmandollar, individually and as Manager of the Phoenix, Arizona, Land Office, and Hon. Stewart L. Udall, Secretary of the Interior, on the following grounds:

1. The plaintiffs' complaint for declaratory judgment for review of administrative action have stated allegations that show that there is an actual or justiciable controversy, requiring a declaration, which the Court could determine completely.
2. There are genuine issues of material facts on the undisputed facts and admitted facts, and on the issues of fact presented by the plaintiffs' complaint.
3. Plaintiffs, opposing parties to the motion for summary judgment, is unable to present sufficient facts which plaintiffs sought to supplement and complete by deposition which has been noticed June 9, 1963, but which has been opposed by motion to stay the taking of said deposition by defendants Jurko jointly with defendants Helmandollar and Secretary Stewart L. Udall.
4. On the established facts, the principles of substantive law warrant summary judgment in plaintiffs' favor.

This opposition is based upon the complaint, the Notice of taking the deposition of Andrew G. Jurko, and other pleadings heretofore filed herein, the exhibits attached to the complaint, and the following documents and transcripts and decisions:

1. Transcripts of Proceedings in Mineral Contest No. 10379 consisting of two volumes and exhibits;
2. Decision dated August 24, 1960, by Hearing Examiner Rudolph M. Steiner, in Contest No. Arizona 10379;
3. Decision dated February 17, 1961, by A. H. Furr, Appeals Officer, Bureau of Land Management, Department of the Interior, in Contest No. Arizona 10379;
4. Decision dated June 22, 1962, by Deputy Solicitor Edward W. Fisher, on behalf of the Solicitor of the Department of the Interior, No. A-28876, in Mineral Contest No. Arizona 10379.
5. Affidavit of Blaine J. Lord in support of Opposition To Defendants' Motion for Summary Judgment.
6. Affidavit of Glen Allen, executed on 28th of August, 1963.
7. Affidavit of Joanne Neufang, executed August 21, 1963.
8. Chunk of magnetite iron reduced by a new and cheaper process to be presented in court at the hearing.

Respectfully,

Jose del Castillo
JOSE DEL CASTILLO
Counsel for Plaintiffs

Filed: September 3, 1963

STATEMENT BY PLAINTIFFS OPPOSING MOTION FOR
SUMMARY JUDGMENT, BY DEFENDANTS HELMANDOLLAR
AND SECRETARY UDALL, OF MATERIAL FACTS AS TO
WHICH THERE ARE GENUINE ISSUES ACTUALLY IN
EXISTENCE, AND, CONTROVERTING IN GOOD FAITH THAT
OF DEFENDANTS'

Plaintiffs, pursuant to local Rule 9(h), Rules of this Court, respectfully submit, in opposition to defendants Helmandollar and Secretary Udall's motion for summary judgment, the following statement of material facts actually present and requiring determination and presenting genuine issues, and in good faith controverting that made by said defendants:

1. (a) In a contest filed by the United States on December 15, 1959, the said contestant charged that the land encompassed by the mining locations is nonmineral in character insofar as locatable minerals are concerned, and that the mining locations were not made in good faith, and were not located for mining purposes and are not being so used.

(b) Plaintiffs "collectively and separately denied" the charges and alleged:

- (1) that a discovery of valuable mineral had been made on each and every one of the named claims;
- (2) That the land encompassed by these locations is mineral in character insofar as locatable minerals are concerned;
- (3) That the mining locations were made in good faith, were located for mining purposes, and are being so used.

(c) That a hearing was held on March 19, 1960, and thereafter the Hearing Examiner of the Bureau of Land Management found and decided that

- (1) "minerals have been shown to be present in the alluvium exposed on the subject claims", "the most important of which is magnetite"; (Decision, Hearing Examiner, August 24, 1960, page 6).
- (2) that the contestant failed to establish that the locations were not made in good faith; (Id.)
- (3) that "There is no evidence of any actual consequential use of the subject lands for purposes other than mining. It is concluded that the said allegation has not been sustained." (Id.)

(d) In turn plaintiffs showed that, and by the record,

- (1) valuable minerals have been discovered found within the subject claims, and that magnetite is present in quantity and quality which is marketable in the production of steel, as ordinary iron when pelletized, and recoverable at low cost; that the garnet present in said claims is likewise marketable and recoverable at low cost, by processes in use. Proof preponderates for plaintiffs.
- (2) That the locations are made in good faith, and
- (3) that the subject land is being used for mining purposes and for no other purpose.

(e) The Hearing Examiner, raising the question as to whether the minerals in the locations, the most important of which is magnetite, are present in such quantity as "to warrant a prudent man in the expenditure of his time and money with a prospect of developing a paying mine," held that based upon quantitative analyses and theoretical value of recoverable minerals far exceeds cost of recovery and marketing thereof, basing his decision mainly on Prof. Lacey's testimony. Professor Lacey's analyses and assays were based mainly on samples from a well drilled in one of the claims which are subject of the contest and this action; that the government witnesses themselves admit that "true samples of this material could be gotten in cutting", and that has not been done; that the values testified to by government witness does not represent true values because they were not derived from "true samples".

The genuine issue from such material facts is: Whether the Hearing Examiner's decision (and those of the appeal officers affirming it) is supported by substantial evidence or not. And this issue should be tried by the Court upon the merits.

2. The second genuine issue of fact is whether plaintiffs, in the administrative hearing and appeals, were denied a fair hearing and the full opportunity to present all the evidence which they deemed important in their defense. Plaintiffs' contend that they were denied a fair hearing and the full opportunity to present all the evidence they deemed important

in their defense, on the grounds that the subjects claims having filed August 31, 1959, were, before development sufficient to meet the matter of commercial value the contestant's witnesses demanded, contested on December 15, 1959, and the trial or hearing set on March 16, 1960, three months after filing. In which hearing the plaintiffs were required, by the character of the evidence presented by contestant, to show commercial values. Plaintiffs timely made application for continuance, according to the administrative rules, upon the grounds that a material witness William Hazel was ill with asthma in North Carolina and could not attend the hearing and that even having exercised due diligence, plaintiff were hampered and prevented from securing the necessary evidence to make their defense; the Hearing Examiner denied the motion for continuance; at the time of hearing, plaintiffs renewed the motion, and it was again denied. In the plaintiffs' appeal to the Secretary of the Interior, plaintiffs filed a motion, supported by affidavit stating reasonable grounds therein, for leave to present additional evidence which would tend to prove that the production and sale of some of the minerals in local markets, and the cost of extracting the minerals, shall not be as high as claimed by the government witnesses. The evidence would have rebutted the testimony of the contestant's witnesses on a matter which were not expected in such a hearing. The Secretary denied the motion on the ground that "nothing in the record suggested" any equitable basis for reopening the hearing. The plaintiffs contend that such equitable basis are present in the record.

Plaintiffs, further, state that facts to substantiate their contention, and the issue above stated, may be obtainable from and by Andrew G. Jurko's deposition. Taking of the deposition has been noticed, but defendants Jurko and Helmandollar and Secretary Udall jointly moved to stay the taking of the deposition.

3. The third genuine issue is whether the plaintiffs were denied an impartial hearing throughout the administrative proceedings. Attached to the Complaint is Exhibit "A", a letter from Hon. Stewart L. Udall to Glen Allen, a contestee in the proceeding below, on behalf of his client Andrew G. Jurko, concerning said subject mining claims, containing an implication of invoking all remedies his client may have. Then came the contest within such a short time after the filing of the claims, and within two months after Hon. Udall's letter. At the time the letter was written and when the contest was filed, Hon. Udall was a member of the House of Representatives committee on insular affairs and of the interior. While the appeals were proceeding, and before the final administrative decision, Hon. Udall became the Secretary and the head of Department of the Interior under which, or in which is the Bureau of Land Management. Further, and other additional facts shall be available when the deposition of Andrew G. Jurko is taken; and that of Stanley C. Soho.

Respectfully submitted,

JOSE DEL CASTILLO
Counsel for Plaintiffs

Filed: September 3, 1963

AFFIDAVIT IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF ARIZONA)
) ss.
County of Pima)

BLAINE J. LORD, BEING FIRST DULY SWORN TO ON OATH
DEPOSES AND SAYS:

That he is a citizen of the United States of America; and that he is of legal age; that the following statements are made from his own personal knowledge and that he is qualified to make them.

That he is one of the plaintiffs in the above entitled case; that he was present during the administrative hearing of the government contest involving the subject mining claims in the above entitled case located in Section 19, Township 12 South, Range 13 East, Gila and Salt River Base Meridian, in Pima County, Arizona, held in Tucson, Arizona on March 16, 1960, and that he has been interested party in the entire administrative proceedings and has personal knowledge of the matters pertaining the case.

That the original copy of the letter, attached to the complaint in the above entitled case as Exhibit "A", which is a letter written by Stewart L. Udall to Glen Allen, dated October 5, 1959, concerning certain placer mining claims Glen Allen filed; that Glen Allen did not file mining claims in section 18, T. 12 S., R. 13 E., G & SR B M. in Pima County, Arizona, but on section 19 of the same township and range in the same county and state; that Andrew G. Jurko, referred to in said

letter as client of Hon. Stewart L. Udall, claimed that section 19, T. 12 S., R. 13 E., G. & SR. B.M., in Pima County, Arizona, where the mining claims in question are his, that the land belongs to him; that affiant shared with the contestees in the administrative proceeding the belief that the letter of Hon. Udall was inspired and instigated by Andrew G. Jurko based upon his claim of ownership of said section 19; that shortly prior to filing the complaint in the above entitled case, Andrew G. Jurko drove away plaintiffs' workmen from the said mining claims and threatened to prosecute as "trespassers" who ever shall enter said section 19, that he claimed he was being backed by his claim of ownership by the Land Office.

That contestees, filing the subject mining claims, have developed them in good faith and have used the said land from then on to the present for no other purpose than mining. That the subject mining claims are within proximity of local markets, among them are: Kennecott Corporation, Ray Mines Branch, about 60 miles; American Smelting & Refining Co., Silverbell Unit, Silverbell, Arizona, about 24 miles; Duval Sulphur & Potash Co., Nogales Highway and Duval Mine Road, about 36 miles; Phelps Dodge Corporation, Bisbee-Douglas, Arizona, about 90 miles.

That the Kaiser Steel Corporation has put up in California a reduction plant to process magnetite iron and are interested in the supply of magnetite in Arizona, and that Japanese interest have sent agents in Arizona looking for magnetite iron supply; that there is an increasing demand for magnetite ore, and pelletized form of the magnetite, and in the form of sponge iron used in recovery of copper, and used in making

steel. That Arizona magnetite deposits will provide a major industry, especially when steel could be made from it in the west coast of the country and save freight charges for same steel from the eastern part of the United States. That extracting processes, among them, a direct reduction process, reduce the cost of recovery and production, and make possible a profitable mine. That the low grade copper ores which consist of the Arizona copper mines would not have been recovered profitably were the mineral mined by the conventional method of shovel and truck, on which Prof. Lacey, testifying for the Government, based his costs estimate of operating an acre of ground.

That when on the appeal to the Secretary of the Interior, contestees moved for leave to present additional evidence, we have sufficient proof in demonstrating present values of the minerals discovered in said land, as well as estimates of costs and profits to be made.

Dated this August 29, 1963

Blaine J. Lord

Affiant.

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Glen J. Allen, being first duly sworn upon his oath deposes and says that he is a citizen of the United States; that he is over the age of twenty-one years and that the following statements are made from his personal knowledge and understanding and that he is qualified to make said statements:

That he is the original locator of Sec. 19, T. 12 S1, R. 13 E.

That he is now engaged in a profitable mining operation in the Owl Head mining district located south and adjacent to the doubtfully titled claims of Udall & Udall, said operation being a 200 T.P.D. using a screening and magnetic separation.

That Sec. 19, T. 12 S., R. 13 E., lies within the same alluvial ore body and that the percentages run approximately the same.

That Sec. 19, T. 12 S., R. 13 E., having an ore value approximately the same as the mining land now being mined, all costs and profits would be equal.

That the hereto attached correspondence and records of business transactions are self-explanatory and are all related to the present mining operation of Sec. 1, T. 9 S., R. 11 E., Pinal County, Arizona

Glen J. Allen

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Joanne Neufang, being first duly sworn upon her oath deposes and says that she is a citizen of the United States; that she is over the age of twenty-one years and that the following statements are made from her personal knowledge and understanding and that she is qualified to make said statements:

That on or about the 15th or 16th day of September, 1959, she,

together with her infant child and her mother and father, had driven their car onto one of the mining claims on Sec. 19, T. 12 S., R. 13 E., in the County of Pima, State of Arizona; that she and the other individuals were examining said claims when a man drove up to the claims on Thornydale Road, which runs parallel to said claims and yelled at affiant and her company to get off his land - That they were trespassing. Affiant walked over to the man who then informed her that his name was A. Jurko and that affiant and her party had no right to be on the land because it was his by reason of a grazing lease and upon being informed by the affiant that the land was federal and that affiant was upon the land under a mining claim, A. Jurko replied that the mining claim was invalid because of his grazing lease. Mr. Jurko was insulting in manner and must have been cursing because he upset affiant more than he could have otherwise.

AFFIANT

Filed: September 3, 1963

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

Blaine J. Lord, being first duly sworn upon his oath deposes and says that he is a citizen of the United States; that he is over the age of twenty one years and that the following statements are made from his personal knowledge and that he is qualified to make said statements:

That he, with his associates, did construct a pilot plant for the

reduction of magnetite on Section 19, T. 12 S., R 13 E. of Pima County, Arizona, in the later part of 1961 and the early months of 1962.

Said pilot plant was designed and constructed on a direct reduction style, using hydrogen gas derived from a liquid methane gas. Production capacity of pilot plant is 2 tons per day but can be increased to a 10 T.P.D. capacity with the installation of a rotary feeder.

The construction of this pilot plant took about five months to complete and prove out. Magnetite ore used in the pilot plant was separated by the use of a magnetic wheel.

From ground to finished product, the cost has been estimated as follows: \$3.50 per ton for separation of magnetite and \$10.75 per ton for reduction, including cost of materials and labor with a total cost of \$14.25 per ton.

Inquiries of local mining companies have shown a demand for reduced magnetite for copper leaching and the current market price for reducte magnetite is \$40.00 to \$50.00 per ton.

Available markets are within a 20, 30 and 60 mile radius from the location of pilot plant and mining claims.

I now further attest that the Honorable Morris Udall, brother to the new Secretary of the Interior, along with other United States Congressmen, visited the mining claims in question, and viewed the reduction plant. The Congressmen were given a sample of the reduced magnetite and examined the pilot plant mechanics. The hereto attached article taken from

the Tucson Daily Star shows a portion of the reduction plant in the background.

The hereto B. C. D. Exhibit samples are; raw magnetite, partially reduced magnetite and fully reduced magnetite. These samples are the product of the herein described pilot plant and were taken as raw magnetite direct from the mining claims now under contest.

Blaine J. Lord

AFFIANT

Filed: September 10, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----x
BLAINE J. LORD, et al,

Plaintiffs

v.

Civil Action
No. 987-63

ROY T. HELMANDOLLAR, etc., et al,

Defendants

-----x
Washington, D.C.

Wednesday, September 11, 1963

The above-entitled matter came on for hearing on motion of defendant Jurko to dismiss and on motion of defendants for summary judgment before the HONORABLE EDWARD A. TAMM, United States District Judge.

APPEARANCES:

JOSE DEL CASTILLO, ESQ.,

For the plaintiffs

RALPH S. BOYD, ESQ., and
HERBERT PITTLER, ESQ.,

For Defendants Helmandollar and Udall

ELMER F. BENNETT, ESQ.,

For the Defendant Jurko

PROCEEDINGS

THE DEPUTY CLERK: No. 23, Lord versus Helmandollar, et al.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

MR. BENNETT: If Your Honor please, the attorney for the plaintiffs, Mr. Del Castillo is here from Tucson. He informs me of a fact which the firm in Tucson which retained us has not informed us as yet, namely, that Mr. Jurko has passed away since this motion was set before the Court.

In these circumstances, if Mr. Del Castillo is prepared to agree to an order of dismissal in this case subject to our producing a death certificate, why, of course, then this motion would be moot. But, on the other hand, if he has not made his decision yet with regard to the possibility of a motion for substitution of parties under Rule 25, then, of course, I would very much prefer to submit these rather clear-cut motions regarding venue and service to the Court. I see no particular point for any extended argument on it but I would like to see the case, so far as the interests of Mr. Jurko are concerned, terminated.

THE COURT: What do you intend to do in the light of the death of Mr. Jurko?

MR. DEL CASTILLO: Yes, I have so informed Mr. Bennett that Mr. Jurko died while we were proceeding on these motions, I think, somewhere the last week of August of this year and that I have read it in the newspaper. However, I have no definite knowledge of his actual death.

I would agree to the dismissal of this motion -- I would like to agree to Mr. Bennett's motion provided that and subject to his providing a duly authenticated death certificate of Mr. Jurko.

THE COURT: I am sure that is agreeable.

MR. BENNETT: Yes, Your Honor.

ORAL RULING OF THE COURT

THE COURT: Very well. I will dismiss the action as to the defendant Jurko subject to counsel being furnished with a certified copy of the death certificate.

MR. BENNETT: Thank you, Your Honor.

ARGUMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MR. BOYD: May it please the Court, my name is Ralph S. Boyd appearing for the defendants Helmandollar and Udall.

This case is here before the Court on a motion for summary judgment. If it presents any question at all, the only question that is presented is whether the decision of the Secretary of the Interior holding the mining location, as made by the plaintiffs, be invalid is supported by substantial evidence.

THE COURT: As I recall your findings, it was that there would be a net loss of \$400,000 per acre if an effort was made to commercially exploit this property. Is that correct?

MR. BOYD: That was the evidence in the case; yes, Your Honor. There is no evidence, at least nothing of substance, in the record that tends to refute that. There is nothing in the record which tends to

support the claim of a valid discovery of a valuable mineral deposit in his land.

The administrative record has been filed with our motion. The evidence is reviewed in considerable detail in the decision of the Hearing Examiner. Unless Your Honor has some question about it, I will submit it on that.

THE COURT: The Court has reviewed the entire record.

ARGUMENT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

MR. DEL CASTILLO: If Your Honor please, my name is Jose Del Castillo, appearing as counsel for the plaintiffs.

This case, Your Honor, has turned to be an important case for plaintiffs as well, although it involves only Section 19, Township 12 South, Range 13 East. The significance of your decision shall affect the newly-found industry of Arizona.

Yesterday, I have submitted a supplemental affidavit and which the last paragraph refers to certain exhibits which we cannot attach: Exhibit B, which is a magnetite iron ore separated from the samples obtained from this subject claim. Exhibit C, which is a partial reduction which we label as sponge iron partially reduced from the samples of magnetite iron from the samples obtained from this subject claim. And Exhibit D, which is solidified iron from the same magnetite ore from this claim, which is so hard that the metallurgist in the University of Arizona tried to cut this and only succeeded in cutting a piece.

I would like to call the Court's attention to certain magnetite particles which have not solidified. This has been compressed into a tube of magnetite; that this alluvium deposits in this Section 19 are of the same alluvium body of much of the deposits in the State of Arizona, especially of the already filed claims by the original locator of Section 19.

THE COURT: What do you say to the Government's finding that economically it is not practical to mine these minerals even though they exist because presumably the cost of mining would be so much greater than the return that economically it is infeasible and, consequently, this is not mineral land?

MR. DEL CASTILLO: Your Honor, this iron ore is a valuable mineral and I submit for your consideration the Government's notice that federal assistance in financing exploration for mineral reserves which, escaping to the matter in point, says that the amendment of Section 301.3 would add to the list of mineral commodities silver, iron ore, bismuth, sulphur and tellurium, which are considered to be vital to the economy of the United States and would permit the Government to pay up to 75 per cent of the costs authorized in exploration assistance contracts for certain other mineral commodities in relatively short supply.

If iron ore is important to the economy of the United States and is a valuable mineral, the decision of the Examiner saying that there was not enough mineral present based upon the quantitative analyses showing that the theoretical value of recoverable minerals present is

far exceeded by the costs of the recovery and marketing thereof and that it is in error since in the case of *United States v. C.F. Smith*, 1959, 66 LD 169, it has been held that

"The mining laws do no require as the Forest Service suggests, that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about."

It insisted that the time-honored test to be applied in determining whether a discovery has been made on a lode claim is that set forth in *Jefferson-Montana Copper Mines Company*, 41 LD 320, which reaffirmed and reiterated the holding in *Castle v. Womble*, 19 LD 455, where it is stated:

"In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which, in the judgment of the register and receiver and your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed."

The same fact situation in this case is similar to that stated in *Castle v. Womble*.

The opinion continues: "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a

valuable mine the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.' For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

The prudent man test has been generally accepted as the proper definition of a discovery in all types of cases involving mining claims, and are defined in the above cited cases. They have ruled out that the ore need be in commercial quantities which will yield a profit. *East Tintic Consolidated Mining Co.*, 43 LD 79; *United States v. M. W. Mouat*, 61 ID 289; *Freeman v. Summers, United States, Intervener, et cetera*, 52 LD 201; *United States v. C. F. Smith*, 66 LD 169.

In those cases, in the prudent man's test, there are only two or three things that should be noted: that in the lodes or in the land, there is mineral present, valuable mineral and that there is a deposit or lodes bearing minerals.

THE COURT: And your position is the fact that the present operation would not be economically feasible is not a bar to your claim of the land; is that correct?

MR. DEL CASTILLO: It is not a bar to the claim under the cited cases.

And that, therefore, when the Examiner, the defending agency decided to and required proof of commercial profit element, it was -- the decision was capricious and arbitrary because it is against its former procedure and holdings. By the weight of authority and of law, the Hearing Examiner's decision has misapplied the rule of prudent man's test. This is not a case of gravel and rock, in which case a commercial value has to be proved and such elements as availability of market, profitable recovery and such. The plaintiffs have shown even at the hearing that the recovery is reasonable and that it will yield profit; that by the new processes that are being used and they have gone further to state in testimony and also in affidavits that the markets for this material are within 30 and 60 mile radius in Arizona itself, and that the current demand at that time as well as now is the same, that certain important mining firms as well as milling companies in the area are in for the market.

The partially reduced Exhibit C before you, Your Honor, is what we call sponge iron. It is used by the copper companies in Arizona. Arizona, by the way, is the leading producer of copper. For leaching purposes heretofore they have been using tin cans, but it has become

impracticable as well as it rusts and rust is a problem in the process. But the sponge iron has been used and they recover more copper in using sponge iron as well as after they have used the sponge iron, the sponge iron can be solidified into iron and into steel. The Kaiser Company has developed a plant in California for this purpose, and there are other foreign markets, like Japan who has representatives in Arizona as well as in California.

The statute, 30 USCA, Section 22 and 23, relating to the location and discovery of mining claims, makes the claimant's right dependent upon discovery of minerals and not upon the decision of the Secretary of the Interior as to whether or not there has been a discovery. We have shown that there has been discovery of valuable minerals in this land and it is a mineralized land according to the record and testimony of the witnesses of the Government as well as the plaintiffs.

And we have presented the issue that the decision of the Examiner was not supported by substantial evidence because, first, it is on the record the Examiner found that the land is mineralized and that the most important is magnetite ore; that these mining claims were filed in good faith and they are used for no other purpose than for mining.

Every charge of the Government has been, therefore, not substantiated and that the claim by the plaintiffs that there has been a valuable mineral found and that the land is mineralized and that the claims were filed in good faith and that the mining claims are used for no other purpose than for mining has been upheld. As we said before,

proving a commercial value is not essential in the application of this prudent man's test and it is not a bar, and also further we claim that the decision was not supported by substantial evidence because the exhibits of the contestant, Exhibit 27, on the very last page says:

"It should be noted that the sample submitted for examination was extremely small. Some of the fractions containing valuable minerals weigh so little that true evaluation cannot be done at this point. If the sample submitted represents material taken from one location only it means very little; however, if it is a component sample, or a number of samples thrown into one then it means a bit more."

"To truly evaluate a piece of ground for heavy minerals a number of one-cubic foot samples should be examined."

So that their sample, therefore, has no probative value and upon this sample this quantitative analysis and the values therein deduced have no probative value even if we are required to prove commercial value and profit.

The witness LaMar G. Evans, for the government, when asked, "Were you the miner in this instance, would you feel that you have been fairly treated if a sample such as this had been taken to prove the value of your claim?" And he answered: "If I were the miner in this particular land, I would do some prospecting." That is transcript hearing proceeding of March 16, 1960, page 129.

Government witness, Professor Williard Lacey, shown a sample of the material found in said claims and having examined it with a magnifying glass and having identified the mineral content to be weathered garnet material that contains magnetite primarily, and although he would not make an estimate as to its value, said: "If I saw this much magnetite in the sand, I would continue to look."

He had not looked further. They had taken the samples from diggings from one well on one mining location and upon that he based his values upon that location. I submit, Your Honor, that samples taken from one location has no probative value for the four locations which consist the subject of this case and that, therefore, the decision of the Examiner as well as affirming it has been made without substantial evidence to support and that they are arbitrary.

The administrative agency's findings are entitled to respect, but such findings must nonetheless be set aside when the record before the Court clearly precludes agency's decision from being justified from fair estimate of the worth of the testimony of witnesses. They have not done so.

In Bonica v. Olesen, 126 Federal Supplement 398, it is said:

"The Supreme Court has recently set forth the kind of scrutiny which a reviewing court must give administrative record to justify itself that the agency action rests on adequate proof.

In Universal Camera Corporation v. National Relation Board,

340 US 474, 71 Supreme Court 456, 464, 95 Law Edition 456, the court said:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting an administrative decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

Your Honor is the procedural review under which this case is brought, the Administrative Review Procedural Act.

The plaintiffs next contend that they did not receive a fair hearing and the full opportunity to present all material evidence in their defense, by reason of the fact that the Hearing Examiner refused to postpone the hearing set on March 16th although the plaintiffs made timely application for it and gave valid reasons for such extension of time; that they were not completely prepared in compiling the evidence necessary to meet the government proof; and also that one of the important witnesses, William Hazel, was suffering attacks of asthma in North Carolina and could not attend the hearing. Because of this the plaintiffs again renewed the motion at the time of the hearing. It was again turned down.

Then in an appeal to the Secretary of the Interior, Stewart L. Udall, they asked for leave to present additional evidence. It was denied on the ground that if it was opened, another hearing will be given and witnesses presented and that there were no equitable reasons for doing so. There were a lot of equitable reasons for doing so.

Since the Secretary of the Interior Udall from the beginning of this case was personally interested in the outcome of this matter as we have shown by our exhibits and the inference is with us that out of thousands of claims filed by Glenn Allen, only Section 19 has been contested because, as we claim, Honorable Udall is personally and professionally interested in the outcome of this matter.

The Supreme Court in Atchison, T. & S.F.R. Co. v. United States, 284 US 284, 76 Law Edition 273, 49 Supreme Court 106, says:

"The prospect that a rehearing may be long does not justify its denial if it is required by the essential demands of justice."

And where, it says:

". . . hearing, suitably requested, which would have permitted the presentation of evidence relating to existing condition, was denied." The Court says: "We think that this action was not within the permitted range of the Commission's discretion."

Denying evidence to be presented relating to the really existing conditions at the time was not within the range of the agency's discretion. They should have been given leave to present this evidence to show that condition.

The motion for leave to present additional evidence in the case at Bar were to rebut the evidence introduced by the government beyond the limits of the issues confronting the plaintiffs. The Government introduced commercial values, analyses of values, which the plaintiffs were not -- although they have some evidence to that effect -- have not amassed enough to contest the government; but commercial values and profit are not necessary.

"Congress, in requiring a 'full hearing,' had regard to judicial standards -- not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

That is what the law is in Atchison. The Supreme Court says that even at this stage, they should have accepted the evidence.

The decisions of the defendants administrative agency and that of the Secretary of the Interior were made by administrative fiat and were capricious and arbitrary. The hearing of March 16, 1960, was inadequate and manifestly unfair, and the holding, as we have above shown, contrary to the evidence. The Supreme Court, in Interstate Commerce Commission v. Louisville & N.R. Co., 227 US 88, 57 Law Edition 431, 33 Supreme Court 185, says:

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate, or manifestly unfair, if the finding was contrary to the indisputable character of the evidence."

And those two requirements obtain in this case.

The Secretary of the Interior cannot compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay when that minimal requirement for contestants, in a government contest, to present additional evidence even if such would have reopened the case was ignored and refused especially where, as in this case, he was professionally and personally interested in the outcome of the administrative proceeding.

All we ask of the Court is to let the plaintiffs hold their mining claims and develop it as a paying mine which has more than a promise, that the facts are not speculative but actually existing, as supported by our affidavits on the file and our exhibits, and that the decision of the Hearing Examiner and the decisions of the whole administrative agency be declared null and void.

Thank you.

THE COURT: What do you say to the cases cited by counsel that seem to hold that economic feasibility of practicability is not necessary to the establishment of a mineral claim?

MR. BOYD: The answer to that, Your Honor, is that test was no imposed upon these plaintiffs. Instead the test established by the Supreme Court was imposed and followed, namely, whether the discovery which is made is of such a nature as to induce a reasonably prudent informed man in the field to invest his money in the hope reasonably to develop a valuable mine.

THE COURT: What do you say about the allegation that the Secretary of the Interior was personally interested in the outcome of the case?

MR. BOYD: In the first place, Your Honor, it is insinuated rather than alleged. In the complaint, it is suggested that perhaps it might have influenced the decision. They don't dare come out with an allegation that it did.

As a matter of fact, in the course of the proceedings through the Department of the Interior, the Secretary never touched it and instead the decision followed the usual course, went to the Solicitor and the decision was made by the Deputy Solicitor.

There is not and there cannot in good faith be any charge made that the Secretary influenced or attempted to influence the Deputy Solicitor in reaching upon his decision.

Furthermore, the evidence is overwhelming in support of the decision; and even if it were corrupt, it would still be right.

THE COURT: Anything further?

MR. BOYD: No, Your Honor.

THE COURT: The last affidavit filed by the plaintiffs was not in the Court's jacket at the time the Court reviewed the file.

I will review this affidavit and pass on the matter promptly.

MR. BOYD: May I suggest, Your Honor, of course the case is controlled by the administrative record and the Secretary's decision cannot be impeached by extraneous evidence in a hearing of this kind.

MR. DEL CASTILLO: Your Honor, may I make a statement? I have--

THE COURT: It is unnecessary. The Court has heard you.

(Whereupon, the hearing on motion was concluded.)

C E R T I F I C A T E

The foregoing is certified to be the official transcript of proceedings in the case of Blaine J. Lord, et al, versus Roy T. Helmandollar, etc., et al, Civil Action No. 987-63, held on Wednesday, September 11, 1963.

Eva Marie Sanche
Eva Marie Sanche
Official Court Reporter

Filed: September 11, 1963

ORDER DISMISSING DEFENDANT A. G. JURKO

This cause came on to be considered on September 11, 1963, on the Motion to Dismiss on behalf of the defendant Jurko. It appearing that (1) Defendant Jurko had deceased on August 25, 1963; (2) Plaintiffs' counsel agreed in open court that the action would be dismissed upon presentation to him of a certified copy of the death certificate pertaining to the Defendant Jurko; and (3) counsel for Defendant Jurko has now served upon Plaintiffs' counsel a copy of the aforesaid death certificate, upon consideration thereof, it is by the court, this 16th day of September, 1963,

ORDERED, That this action is dismissed as to the Defendant A. G. Jurko.

/S/ Judge Tamm
Judge

Filed: September 16, 1963

JUDGMENT

This case having come on for hearing on defendants' motion for summary judgment and plaintiffs' motion for summary judgment, and the Court having heard argument of counsel and considered the material in support of both motions,

WHEREFORE, IT IS ORDERED as follows:

1. Defendants' motion for summary judgment is granted.
2. Plaintiffs' motion for summary judgment is denied.
3. Judgment is hereby entered against the plaintiffs and in favor of the defendants and the complaint is dismissed.

Dated, this 30th day of September, 1963.

/S/ Edward A. Tamm
United States District Judge

Filed: September 30, 1963

MOTION FOR ORDER TO VACATE
AND RE-ENTER JUDGMENT OR ORDER

The plaintiffs move the Court for an order to vacate and set aside the judgment or order granting summary judgment in favor of the defendants and against the plaintiffs in this action, and all subsequent proceedings thereon, and to re-enter said judgment or order, and to allow the plaintiffs to file a Notice of Appeal and to pursue an appeal, on such terms as may be just, on the ground that plaintiffs and their Arizona attorney, of counsel, failed to receive the notice of the entry of judgment and of the judgment or order itself by reason of inadvertence and excusable neglect occasioned by unusual circumstances and the confusing fact that the attorney actually concerned and who argued the case before the Court had expected that he may be served with the judgment or notice of entry of judgment, and that he had believed that when such judgment

or notice of entry thereof shall be serve, the local attorney would present in the country and in Washington, D.C. That under the circumstances, it shall be in the interest of justice to allow the plaintiffs to pursue an appeal.

This motion is based on the affidavits attached hereto and made parts hereof, executed by Jose del Castillo, Esq., and Cornelio O. Lopez, Esq., and on the Memorandum of Points and Authorities.

JOSE DEL CASTILLO
Attorney for Plaintiffs

Filed: February 4, 1964

AFFIDAVIT OF JOSE DEL CASTILLO, Esq., IN SUPPORT OF
MOTION FOR ORDER TO VACATE AND RE-ENTER JUDGMENT
OR ORDER

STATE OF ARIZONA)
)
 ss.
COUNTY OF PIMA)

JOSE DEL CASTILLO, being first duly sworn to on oath according to law, deposes and says:

That he is the attorney, of above plaintiffs, in Arizona, of counsel, in the above cause, residing and has his offices in Tucson, Arizona; that judgment or order granting the defendants' motion for summary judgment has been entered in favor of the defendants and against the plaintiffs; that affiant and plaintiffs have just learned of said judgment or order;

That plaintiffs have good and valid cause for appeal and have intended and have always intended to appeal on the event that the defendants' motion would be granted on their showing and argument on the record; but before plaintiffs and affiant have the opportunity to initiate and file a notice of appeal, they have not learned or have personal notice of the entry of the judgment or order, until their receipt of a "clear-out" demand from the defendants from the said mining claims, informing them that such a judgment or order has been rendered and entered in favor of the defendants and against the plaintiffs and that no appeal has been taken by plaintiffs; that such "clear-out" demand or Notice To Remove Unauthorized Structures is hereto attached to this affidavit and made a part thereof;

That immediately on learning that said judgment or order has been rendered on September 30, 1963, affiant contacted by long distance telephone the local attorney, of counsel, Cornelio O. Lopez, Esq., as to existence and service of said judgment or order, and learned from him that when the judgment or order has been served by ordinary mail, the said local attorney, Cornelio O. Lopez, was out of the country on business, and that by inadvertence must have been overlooked and was never forwarded to affiant or its contents communicated to him, and by some excusable neglect the said judgment or order, or the notice of the entry thereof, has not been forwarded or communicated to affiant; that directly, then, affiant requested attorney Cornelio O. Lopez, Esq., to file a notice of appeal, but that, on computing the time which has

passed since the entry of the judgment or order, the period within which an appeal may be made has lapsed; that directly after affiant's telephone conversation with said local attorney, affiant executed this affidavit and made the Motion For Order to Vacate and To Re-enter Judgment.

That the defendants, the party in whose favor the judgment is rendered, has not served a formal notice to the plaintiffs of the entry of judgment, as provided in Rule 77, Federal Rules of Civil Procedure, so as to avoid the possibility of any extension of time for appeal.

That a corroborating affidavit executed by Cornelio O. Lopez, Esq. is hereto attached and made part of this affidavit and plaintiff's Motion For Order To Vacate and To re-enter Judgment or Order filed herein.

JOSE DEL CASTILLO, Esq.
Affiant

Filed: February 4, 1964

AFFIDAVIT OF CORNELIO O. LOPEZ

DISTRICT OF COLUMBIA, SS:

CORNELIO O. LOPEZ, being first duly sworn according to law, deposes and says as follows:

That he is the associate counsel for the plaintiffs in the above-entitled cause, and his office is located in the District of Columbia; and that he was out of the continental limits of the United States during the months of August, September, and October, 1963.

That about the end of September, 1963, a copy of the Judgment in the above-entitled cause was received by his office during his absence; that when he came back to Washington, he assumed a copy of the said Judgment was mailed to his associate, Jose del Castillo, Esq., of 99 South Church Avenue, Tucson, Arizona, by one of the attorneys for defendants; and therefore no copy of this Judgment was ever mailed by this affiant to said Jose del Castillo, Esq.

Cornelio O. Lopez
Cornelio O. Lopez

Filed: February 4, 1964

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR ORDER TO VACATE AND RE-ENTER JUDGMENT
OR ORDER**

The defendants oppose the plaintiffs' motion to reopen this case by vacating the judgment and reentering the judgment so that plaintiffs may appeal to the United States Court of Appeals. The grounds for this opposition are as follows:

Judgment in favor of the defendants was entered September 30, 1963, after oral argument by counsel for all parties. Notice that the court had ruled in favor of the defendants was served by mail by the clerk of the court upon counsel for the defendants and upon Washington counsel for the plaintiffs. A copy of proposed judgment pursuant to the ruling of the court was served by mail upon Cornelio O. Lopez, Washington

counsel for the plaintiffs, on September 27, 1963. On October 2, 1963, counsel for the defendants received a postcard from the clerk of the court giving notice that on September 30, 1963, an order granting defendants' motion for summary judgment and dismissing the complaint had been entered on the docket. The plaintiffs do not assert that similar notices and postcards were not served upon their Washington counsel. On the contrary, Washington counsel in his affidavit admits that a copy of the judgment and the notice of its entry was received in his office during his absence. Yet he apparently made no provision for handling his business during his absence. Instead, counsel for the plaintiffs have informed the court that they assumed that such notices would be sent to them both in Washington and in Arizona.

Rule 4 of the Rules of the United States District Court for the District of Columbia requires that in actions instituted by counsel residing outside of the District of Columbia local Washington counsel be associated. The very reason for the rule, it seems clear, is to obviate the necessity for mailing notices to numerous attorneys throughout the country and to require that an attorney who is a member of the Bar of the District of Columbia and who has an office in the District of Columbia be available to prevent undue delays in the progress of litigation.

Plaintiffs do assert that their local counsel was out of the country during the summer of 1963, but obviously this would not seem to furnish grounds for reopening a judgment merely to permit the taking of

an appeal because the absence of local counsel is not such "inadvertence or excusable neglect occasioned by unusual circumstances". The absence of local counsel does not constitute inadvertence or excusable neglect, especially in view of the fact that neither the clerk of court nor the attorneys for the defendants were informed that local counsel would not be available to receive notices or appear in any proceedings after the argument of the motions for summary judgment. Counsel for the plaintiffs should have designated other local counsel to represent their interests in the absence of their first designated counsel. The decision in Hill v. Hawes, 320 U.S. 520, the only authority cited by the plaintiffs, is not applicable because in that case it was the failure of the clerk of court to notify the interested party of the entry of an order. That is not the situation in the present case and this matter should not be reopened.

Respectfully,

Herbert Pittle
Attorney for Defendant

Filed: February 7, 1964

ORDER TO VACATE AND RE-ENTER JUDGMENT OR ORDER

The plaintiffs' motion for order to vacate and re-enter judgment or order filed in the above-entitled cause having been given careful consideration, together with defendants' opposition thereto, also filed herein, it is by the Court, this 17th day of February, 1964.

ORDERED, That the plaintiffs' motion for order to vacate and re-enter judgment or order be, and is hereby, granted.

J. TAMM
JUDGE

Filed: February 18, 1964

NOTICE OF APPEAL

NOTICE is hereby given that BLAINE J. LORD, EDYTHE M. KERBER, et al, the plaintiffs above named, appeal to the Court of Appeals for the District of Columbia Circuit from the judgment re-entered on the 16th day of February, 1964, ordering that the Defendants' motion for summary judgment is granted and ordering that the Plaintiffs' motion for summary judgment is denied, and from the judgment entered against the Plaintiffs and in favor of the defendants and dismissing the complaint.

The said re-entered judgment was that entered on September 30th, 1963, which has been duly vacated and then re-entered on the 16th day of February, 1964.

Dated this 4th day of March, 1964.

Jose del Castillo
JOSE DEL CASTILLO
Counsel for Plaintiffs

Filed: March 9, 1964

MOTION TO FIX DIFFERENT AMOUNT OF APPEAL BOND OR TO
DISPENSE WITH IT AND FOR AN ORDER THAT NOTICE OF APPEAL
OPERATE AS BOND ON APPEAL

The plaintiffs, having filed notice of appeal from the judgment and orders of the Court which has been re-entered on the _____ day of February, 1964, to the United States Court of Appeals for the District of Columbia Circuit, now represents to the Court that Rule 20 (e) of the Rules of the United States Court of Appeals for the District of Columbia Circuit provides that no costs shall be allowed in said Court either for or against the United States or an officer or agency thereof. The administrative agency of the United States, the Bureau of Land Management, United States Department of the Interior, and the Secretary of the Interior, are the sole remaining defendants (who shall be the appellees on appeal), rest of the other defendants having been dismissed or not having made any appearance.

Plaintiffs-appellants now move the court to fix a different amount of the bond for costs on appeal according to Rule 73 (c) of the Federal Rules of Civil Procedure, or, to dispense with it, and to order that the notice of appeal operate as a bond on appeal in this cause.

Jose del Castillo
JOSE DEL CASTILLO
Counsel for Plaintiffs

Filed: March 9, 1964

O R D E R

The motion of the plaintiffs to fix different amount of appeal bond or to dispense with it and for an order that notice of appeal operate as bond has been given careful consideration, and there appearing to be good grounds therefor, it is by the Court this 23rd day of March, 1964

ORDERED, That the motion of the plaintiffs that the notice of appeal filed herein operate as bond on appeal be, and is hereby granted.

/S/ EDWARD A. TAMM
JUDGE

Filed: March 23, 1964

DESIGNATION OF RECORD ON APPEAL
TO BE PRINTED IN JOINT APPENDIX

Appellants Blaine J. Lord, et al., respectfully designate the following portions of the record, proceedings, and evidence to be printed in the joint appendix:

1. Complaint for Declaratory Judgment, together with Exhibit A attached thereto.
2. Notice of taking Deposition of A. G. Jurko.
3. Joint Motion of Defendants Roy T. Helmandollar, Stewart L. Udall, and A. G. Jurko For An Order Under Fed. R. Civ. P. 30 (b) Staying the Taking of Deposition Noticed by Plaintiffs.

4. Opposition to joint Motion of Defendants Roy T. Helmandollar, Stewart L. Udall, and A. G. Jurko for an Order to Stay Taking of Deposition noticed by plaintiffs.
5. Minute of any ruling on the motion to stay the taking of the deposition of A.G. Jurko.
6. Motion for Summary Judgment by Defendants, Roy T. Helmandollar, Individually and as Manager of the Phoenix, Arizona Land Office, Bureau of Land Management, and Stewart L. Udall, the Secretary of the Interior.
7. Statement by Defendants, Helmandollar and Udall, of Material Facts as to which there is no Genuine Issue in Support of their Motion for Summary Judgment.
8. Opposition to Motion for Summary Judgment by Defendants Roy T. Helmandollar, Individually and as Manager of the Phoenix, Arizona, Land Office, Bureau of Land Management, and Stewart L. Udall, the Secretary of the Interior.
9. Statement by Plaintiffs Opposing Motion for Summary Judgment By Defendants Helmandollar and Secretary Udall, of Material Facts as to which there are Genuine Issues Actually in Existence, and Controverting in Good Faith that of Defendants'.
10. Affidavits of Glenn J. Allen, executed August 28, 1963, (and exhibits attached thereto need not be printed in joint Appendix).

11. Affidavit of Blaine J. Lord in Support of Opposition to Defendants' Motion for Summary Judgment.
12. Affidavit of Joanne Neufang, executed August 21, 1963.
13. Affidavit of Blaine J. Lord, executed September 4, 1963.
14. Notice of Cross-Motion by Plaintiffs for Summary Judgment.
15. Order dismissing Defendant A. G. Jurko, September 16, 1963.
16. Minute of September 11, 1963, with reference to hearing of motions by defendants in the above entitled cause.
17. Transcript of the Court Reporter's record of the proceedings of the hearing of the defendants' motion for summary judgment on September 11, 1963, as appertains the above case.
18. Judgment, dated September 30, 1963.
19. Motion for Order to Vacate and Re-enter Judgment or Order.
20. Affidavits of Jose del Castillo and of Cornelio O. Lopez, Esq., attached to Motion for Order to Vacate and Re-enter Judgment.
21. Defendants' Opposition to Plaintiffs' Motion for Order to Vacate and Re-enter Judgment or Order.
22. Minute of Court's ruling, granting motion for order to vacate and re-enter judgment or order.
23. Order to Vacate and Re-enter Judgment or Order.
24. Notice of Appeal.
25. Motion to Fix Different Amount of Appeal Bond or to Dispense with it and for an Order that Notice of Appeal Operate as Bond of Appeal.

26. Minute of Court of March 19, 1964, Granting the motion to fix different amount of appeal bond or to dispense with it and for an order that notice of appeal operate as bond on appeal.
27. Order-dispensing with appeal bond and that notice of appeal operate as a bond on appeal.
28. Material portions of the record of the Department of the Interior, File No. Arizona.10379, which shall be designated for printing when the defendants have filed such record in this Court.

CORNELIO O. LOPEZ
Attorney for Appellants

Filed: March 30, 1964

STATEMENT OF POINTS ON WHICH APPELLANTS RELY

1

Error of the lower court in granting the defendants' motion for summary judgment in the light of the facts and the evidence in the record.

2

Error of the lower court in denying plaintiffs' cross-motion for summary judgment on the established facts under the principles of substantive law.

Where the verified complaint charged that plaintiff appellants were denied fair and impartial hearing and denied full opportunity to present all material evidence at the administrative proceedings, and the exhibits attached thereto and affidavits show that the Secretary, Hon. Stewart L. Udall, at all the times mentioned therein had professional and pecuniary interest in the subject matter, and upon interrogatory by the lower court the counsel for the Government conceded such facts to be so, the lower court, in denying plaintiff appellants summary judgment in their favor on their cross-motion, upon the established facts, committed error.

The lower court erred in entering judgment against the plaintiff appellants in favor of defendant appellee, and, in dismissing the complaint, because the appellants have shown that valuable minerals, the main one being magnetite iron, have been discovered within the subject claims, by a preponderance of evidence, and that profit or commercial value, in the case of valuable minerals, is not involved or material in the application of the "prudent man" test, in the law; and that the consideration of commercial value in the application of said test, where valuable minerals were discovered, was capricious, arbitrary, and in violation of law.

And the lower court's granting defendants' motion for summary judgment was capricious, arbitrary, and in violation of law.

Where the Hearing Examiner of the defendant agency found the subject claims to be mineralized and that the most important of such minerals is magnetite iron, a valuable mineral under the law, and the record show that the claimant appellants discovered such valuable minerals, and the Hearing Examiner found and the record show that claimant appellants were mining subject land in good faith and for no other purpose, it was error for the lower court to deny claimant appellants, in their cross-motion, the summary judgment, and it was error for the lower court to grant summary judgment to appellants.

The lower court erred in granting the defendant appellees' motion for summary judgment where the record, pleadings, and affidavits and documents presented and upon admission of defendants, the appellants did not receive a fair and impartial hearing in violation of the due process clause of the Constitution of the United States of America.

Jose del Castillo
JOSE DEL CASTILLO
Counsel for Appellants

Filed: March 30, 1964

NOTICE OF APPEAL

Notice is hereby given this 17th day of April, 1964, that Roy T. Helmandollar, individually and as Manager of the Phoenix, Arizona, Land Office, Bureau of Land Management, and Stewart L. Udall, Secretary of the Interior hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of February, 1964 which vacated and re-entered the prior final judgment of September 30, 1963.

Herbert Pittle
Herbert Pittle
Attorney for Defendants

Filed: April 17, 1964

STATEMENT OF POINT

Appellants Roy T. Helmandollar, individually and as Manager of the Phoenix, Arizona, Land Office, the Bureau of Land Management, the Department of the Interior, and Stewart L. Udall, Secretary of the Interior, respectfully submit the following statement of the point on which they intend to rely: The district court erred in vacating and re-entering the prior final judgment of September 30, 1963, by judgment of February 18, 1964, to permit

appellees to appeal.

RAMSEY CLARK
Assistant Attorney General

ROGER P. MARQUIS

RAYMOND N. ZAGONE
Attorneys, Department of Justice
Counsel for Appellants

STIPULATION AS TO SUPPLEMENTAL RECORD

It is stipulated between counsel that the attached file (Mineral Contest No. Arizona 10379 and the Transcript of Proceedings, consisting of two volumes and exhibits, under the Affidavit of Ernest F. Hom, Assistant Solicitor, Land Appeals, Office of the Solicitor, Department of the Interior), which had been part of the record of this case in this Court and which had been withdrawn by order of this Court, shall be certified and transmitted to the United States Court of Appeals for the District of Columbia as a supplemental record on appeal.

Cornelio O. Lopez
Cornelio O. Lopez
Attorney for Plaintiffs

Herbert N. Pittle
Attorney for Defendants

Filed: May 22, 1964

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18,625

September Term, 1963
Civil 987-63

Blaine J. Lord, et al v. Roy T. Helmandollar, et al

18,680 - Roy T. Helmandollar, et al v. Blaine J. Lord et al

Before: McGowan, Acting Chief Judge, in Chambers.

ORDER

On consideration of the motion of appellants in case No. 18,680 to treat the record on appeal and the joint appendix Lord v. Helmandollar No. 18,625 as the record on appeal and joint appendix in case No. 18,680 on the ground that both appeals stem from the same litigation in the court below and the record on appeal and the parties are the same, it is

ORDERED that the record on appeal in case No. 18,625 shall be treated as the record on appeal in case No. 18,680, and it is

FURTHER ORDERED that the above-entitled cases are consolidated for all purposes.

Filed: July 2, 1964

TRANSCRIPT OF PROCEEDINGS BEFORE HEARING EXAMINER

Held on March 16, 1960

HEARING EXAMINER STEINER: The hearing will be in order. This is the time and place set for hearing of Contest No. 10379, entitled United States of America versus Arizona Exploration Company, et al involving the Canada del Oro, Casas Adobe, Catalina Foothills Estates and Suffolk Hills placer mining claims. (Tr. Proc. H.E. pg/ 3, lines 2 - 8)

* * * * *

HEARING EXAMINER STEINER: * * * Are there any preliminary motions or stipulations?

MRS. GIRARD: Before we proceed I would like to make a motion to postpone or continue this hearing for the reason that an unreasonable amount of time has been given to the contestee to prepare his case. An unreasonable amount of time is determined by many factors. These factors range from the time when the location was first filed to the difficulty in obtaining the evidence.

In this case the location was filed not quite eight months ago. It is highly unusual and irregular for hearings of this sort to take place in less than a year after the filing of a location notice.

Furthermore, the adverse publicity that was given to the contestee interrupted the termination of business transactions which would have otherwise terminated in his receiving money that would have led and helped him to the development of the claim.

He has evidence of discovery of minerals, but because of lack of time he is unable to find evidence which would usually be

admissible in a court of law which would affect its weight and prevent him from giving the substance to the evidence which he would otherwise be able to give. (Tr. Proc. H. E., pg. 6, lines 8 - 25; pg. 7, lines 1 - 6).

HEARING EXAMINER STEINER: The motion is denied. (Tr. Proc. H. E., pg. 7, line 12)

* * * * *

HEARING EXAMINER STEINER: Before we proceed, are there any questions about the issues in this case which are set forth in paragraph 5 of the contestant's complaints?

MRS. GIRARD: I believe so. There is some decision by the Bureau of Land Management that to prove that a valuable discovery has been made the contestee has to show that the mineral he has discovered is valuable in that it has a present market, and that it is found in such quantities to be profitably mineable.

I do not believe that the law or the courts or the statutes sustain such a ruling by the administration, so I would like to know at this time whether we will have to prove that the mineral holds an amount of ore to believe that it will be profitable.

HEARING EXAMINER STEINER: Well, of course we have a very recent decision, United States versus Foster. That guides us in that respect.

MRS. GIRARD: That was just an administrative ruling. It was not a court case, I believe.

HEARING EXAMINER STEINER: That is correct, but we are bound by the

court decision in administrative hearings.

MR. AHO: That is a decision from the Circuit Court of Appeals.

That is not a departmental decision.

MRS. GIRARD: I would still like to point out that I object to any of it as contrary to what I believe the law is without raising each and every objection separately.

HEARING EXAMINER STEINER: Your objection is overruled.

(Tr. Proc. H.E., pg. 9, lines 11 - 25; pg. 10, lines 1 - 18)

TRANSCRIPT OF PROCEEDINGS BEFORE HEARING EXAMINER
(excerpts)

TESTIMONY OF LUTHER S. CLEMMER, WITNESS for the Government

Direct examination;

Q. What is the general mineral and geological character of the area where the lands in question are located?

A. Geologically, the land is an alluvial valley fill consisting of fine to coarse sands, some clay, some gravel, which is material that has been eroded from mountains, the Tortillitas lying to the north and possibly some from Santa Catalinas lying to the east. It is normal valley fill material for the area. Mineralogically there are present in this alluvium some black sands referred to as heavy minerals which our testing showed to be present.

Q. Do you have anything more on geology and mineralization?

A. I believe not.

Q. What do you mean by "alluvium"?

A. Alluvium is water transported material from areas where eroding and breaking down of igneous and metamorphic

Tr. Proc. H.E. Pg. 35, lines 10 - 25

.... and other types of rock is taking place. It is transported of course, in floods and by rains and so forth and deposited over the area with the drainage.

Q. You used the terms "black sands". Is that a geological term or layman's term or an engineer's term?

A. I believe it is used in all three of those respects.

Q. At this time would you tell us what black sand is, since it will probably be very important in this hearing.

A. Well, black sands are black or dark minerals, dark or red. They are those that look black when you see them in a wash or your concentrates. They appear to be black. Some of those minerals, of course, come in various colors and they are normally heavy, not too heavy but specific gravities of three and a half, three, three and a half, four to five.

Q. You stated that the source of the alluvium found on the claims in question were these two mountains, the Santa Catalinas Mountains and the Tortillita Mountains; is that correct?

A. Yes.

Q. What particular material would be carried down from these mountains and ordinarily deposited in a lower valley?

A. Well, the materials that are being weathered. Whatever materials are present in the mountains are carried
Tr. Proc. H.E. Pg. 36, lines 1-25

... down. Of course, the heavier materials tend to be the sort of concentrated along the washes and the lighter materials tend to move on a little further.

Q. Would the genetic material in the mountains tend to be the source of the materials coming down?

A. It is usually so, and the geological reports show that it was probably the source of the alluvium field in this area.

Q. What is a genetic rock?

A. A genetic rock is an igneous rock that was formed at some depth below the surface of the earth and is composed of various minerals, magnetic iron, magnetite, sphene and chlorite and all sorts of things.

Tr. Proc. H.E. Pg. 37, lines 1 -13

Q. Now, you made a number of examinations of the claims in question and my next question is, what improvements did you find on the claims involved in this proceeding? And now, there has been no change in the improvements on the claims; you might say that it has been the same each time and that if you found changes, please state. The question is, what improvements did you find

Tr. Proc. H.E, Pg. 37, lines 19- 25

..... on the claims involved in this proceeding?

A. At the time of my last examination there was no improvement on the claims.

Q. What do you mean by "improvement"?

A. Well, improvement would be pits or workings of any nature.

Q. Roads?

A. Well, there were roads during our first examination where the fence had been cut about every--

Q. As far as in response to my question, you tell us what improvements have been on the claims and in that term include any changes that have been made in the surface of the ground; pits, roads, fences, everything that is on the claims. If there has been a change at a specific time, then please state.

A. At the time of our first examination on October 8th, with Mr. Allen there, there were no pits or workings on the claims.

Q. Was that the 8th or the 6th of October?

A. That was the 8th of October.

Q. All right.

A. There were some roads. The fence had been cut in four places, I believe, and I believe, about each tenth of a mile, I believe, and I believe in one place there was two tenths

of a mile

Tr. Proc. H.E. Pg. 38, Lines 1 - 25

.... gone from it from the southeast corner along Thornydale and at these points the rudimentary roads had been cleared and it appeared to have been done by an inroader or tractor with a small blade. That was the only work there was. There was one clearing on the Casas Adobe Claim. It was an area, I believe about 50 by a 100 feet upon a little knoll. Then on our re-visit to the claims along about February 17th there was a well drilling rig on the southeast corner of Casas Adobe and they had been drilling a well. We had no way of knowing, of course how deep the well was. It appeared that they were using a string of tools-- about a six inch diameter tools. There was some well pipe there that looked to be about two inches in diameter to be installed in the well, and that is the time of course, we cut this sample of the well drill cuttings.

Q. I don't want to get into the taking of the samples now. Continue with your question on improvements.

A. On a date--- a previous date that we were on these claims, I believe it was about sometime in December, I don't recall the exact date, we found that there had been a trailer moved in there near the northeast corner and at still a later date, a date that I don't recall offhand, there was a trailer found to be on the southeast corner, small trailers, near Thornydale Road.

Tr. Proc. H.E. Pg. 39, Lines 1-25

During that visit, I believe it was in December, we noticed that another area had been cleared just north of the quarter corner on Thornydale Road about 150 feet west of the road on a knoll. There had been quite a large area cleared, about

250 feet by a 100 feet in width. On our visit yesterday afternoon we noticed that there were small pits down this large wash and across the south half of this section.

Q. Is that large wash indicated on Contestant's exhibit 12 ?

A. Yes, crossing the south half of the section, and there were small pits and tire tracks of a vehicle about every 100 yards going west for about half a mile where it appeared that, probably, small amounts of material had been removed.

Q. Would you mark that " wash" so there will be no mistake where the large wash runs through this area?

(Witness marked contestant's Exhibit 12.)

THE WITNESS: I didn't mention, but there were four-by four posts which were mining location monuments with a can fastened on containing the location notices for these various claims. That, I believe, is the extent of all-- oh, other than that, now, the well, I believe, had been completed and there is now a concrete cap on the well.

Tr. Proc. H.E. Pg. 40, Lines 1 - 25

There is a motor, gas driven generator, there, evidently for power to operate this pump in the well, and a 100 feet northwest of the well, north to northwest, I believe, there are four concrete footings that have been poured and there is a large Wilfrey type table, about a five by ten or something like that, near these concrete footings.

Tr. Proc. H.E. Pg. 41, Lines 1 - 7

Q. And now, without going into details on your method of sampling will you please state of what your examination consisted in your examination of the claims in question?

Tr. Proc. H.E. Pg. 43, Lines 23- 25

A. Yes --

Q. Tell us, generally, of what your examination consisted.

A. On October 8th?

Q. On all of your examinations. I want just a general statement of how you examined the claims.

A. Well, we examined the claims by first going on the land and identifying the claims. Then, we examined all of the land for any forms of development or discovery work, and then we cut samples from each claim for testing and by checking back occasionally to see if any work had been done since the original examination.

Q. I believe you stated that Glen Allen was with you on October 8, 1859?

A. Yes.

Q. Did Glen Allen point out to you the discoveries on the claims in question or make any statement as to the discoveries on the claims?

A. Yes, We asked Mr. Allen to point out his discoveries and he made the statement to us at that time that all the material ran--was all good, we could sample anywhere. Then we decided then, that we would sample in the approximate center of each of these four placer claims.

Q. Please state specifically on what date you took the
Tr. Proc. H.E. Pg. 44, Lines 1 - 25
....samples, where the samples were taken, how they were taken and of what they consisted.

A. The samples were taken on October 8th, 1959. These samples were taken from near the center of each of these placer mining claims in Section 19. They were taken by first cleaning off the surface and then excavating approximately one cubic foot of the material, the alluvium, from a hole about one foot in diameter and 15 to 18 inches deep. These samples were bagged and properly labeled at that time for later processing.

Tr. Proc. H.E. Pg. 45, Lines 1 - 11

Q. Altogether you took four samples, is that correct, for testing purposes?

A. Altogether we took five. We took four originally, in the presence of Mr. Allen.

Q. How about the composite sample, was that one of the four?

A. No, that was taken at a later date.

Q. That was the fifth sample?

A. Fifth sample, yes, by the well.

Tr. Proc. H.E. Pg. 48, Lines 13- 22

Q. Now, the fifth sample, or the composite sample, is that indicated on exhibit 12 as to where that was cut or taken?

A. Yes, that is. There is a red "X" here by this little black circle marked "well".

Q. Now, I believe you stated the samples were sacked and labeled; is that correct?

A. That is true, yes.

Q. What did you do with the samples?

A. We took the samples to the University of Arizona, here in Tucson, to the Bureau of Mines laboratory in the basement of the geology building for the purpose of running tests.

Q. Who is "we" ?

A. Geologist Ash and myself.

Q. All right.

A. There, with the assistance of and under the supervision and with the aid of Mr. George Roseweare, who is in charge of the lab, we, Mr. Ash and myself, ran tests on their equipment used on a rental basis.

Tr. Proc. H.E. Pg. 49, Lines 6 - 25

Q. Well, let's see. We have completed the story, or the testimony, as to how you took the samples, right?

A. Right.

Q. And how you bagged it?

A. Yes.

Q. And labeled them?

A. Yes.

Q. And you and Ash took them up to the University of Arizona?

A. Yes.

Q. Now, you were going to tell us what you did.

A. I stated that we ran our tests on the Bureau of Mines equipment on a rental basis with the aid of Mr. George Roseveare who is the State Mineralogist or Mettalurgist there is charge of the laboratory. On sample No. one the weight of our sample was

Tr. Proc. H.E. Pg. 52, Lines 10 - 25

.... 68 pounds. This was screened on a 10 mesh.

Q. What exhibit are you referring to?

A. Exhibits 25 and 21. Sample No. one is Exhibit 21. We screened this material, our sample, on a 10 mesh screen. The plus 10 mesh, the fraction that was retained on the screen or passed over the screen, weighed 19 pounds which was 27.9 per cent of our sample and that material was wasted after we made a visual examination and determined that there were no heavy minerals of any subsequence in that material. They were all of the minor sizes in the minus 10 fraction. The minus 10 mesh fraction which was passed through our screen weighed 49 pounds. This was 72.1 per cent of our total weight. This material went to the splitter, Jones splitter talked about earlier by a previous witness. Half of the material from this splitter was saved. One fourth of this material went to the Wilfley type table there at the University and the feed from that table was 5.630 Kilograms. This was calculated of course

because that material went off as calcium and waste. Our concentrate went to the dryer, then was weighed, and weighed .329 Kilograms. This material was 5.85 per cent of our feed...
Tr. Proc. H.E. Pg. 53, Lines 1 - 25

.....to the table and it was 4.21 per cent of the total of the original sample. Then this material was screened on a 20 mesh screen. The plus 20 mesh material, the part that did not pass through, was examined under a binocular microscope to determine if any heavy minerals or any of our heavy fraction was in the 20 mesh, the plus 20 mesh. This examination showed that there were larger grains of quartz and feldspar with small bits of black mineral, probably magnetite or ilmenite, fastened to it, locked in. The minus 20 mesh weighed .276 Kilograms which was 83.9 per cent of our table concentrate or 3.53 per cent of our original sample. Then this material was run through this magnetic separator again and the magnetic concentrate weighed .142 Kilograms which was 51.4 per cent of the concentrate fed to the magnetic separator, which shows that about half of it was magnetic or the other half was not or not strongly magnetic and went to tails which we wasted. Now, this concentrate was 1.81 per cent of our original sample. Now, that was assayed chemically for iron and we got an iron assay 49.40 per cent iron. converting that back to the original sample it showed that the original sample, or the alluvium as taken from the claim would run

Tr. Proc. H.E. Pg. 54, Lines 1 - 25

... .89 per cent iron. I made a note here that this clean black sand which we obtained was 49.4 per cent iron and the grade was approximately double from our original iron assay from our concentrate from the magnetic separator, the dry dirty material, the other fraction we ran through, but the quantity of the iron concentrate was cut almost in half. Another fraction

of this from the splitter 5.660 Kilograms, we ran through the magnetic separator dry. The concentrate weighted .268 Kilograms which was 4.70 per cent of the feed or 3.42 per cent of the original sample. We had this chemically assayed for iron. This ran 23.81 per cent iron. Converting that back to the original sample we get a figure of .81 per cent iron. Then, going to Sample No.2--

Q. I might ask one question there. The information contained in your flow sheet with respect to sample No. one, which has been marked for identification purposes as Contestant's Exhibit 21, is that information summarized on the table which has been marked for identification purposes as Contestant's Exhibit 20?

A. Yes.

Q. All right.

A. We then calculated that it would take approximately-- it would take 25 cubic yards of alluvium to make one long....

Tr. Proc. H.E. Page 55, Lines 1 - 25

... ton of concentrate and the theoretical value of the iron from one yard of this ore or alluvium was 20.8 cents. Now the theoretical value is based on the price of \$22.50 for a long ton unit for Lake Superior ore as quoted in E.& M. J. issue of October 21, 1959. From sample No. two from the Suffolk Hills Placer mining claim our sample weighed 64.75 pounds. That was also screened on a 10 mesh screen. Plus 10 mesh, 21.25 pounds, this was wasted. After a visual examination the minus 10 mesh, or 43.50 pounds, which was 67.16 per cent of the feed, went to the Jones splitter. One half of this material from the splitter, the minus 10 mesh, was saved again. One fourth of this material went to the magnetic separator dry. Our feed to the separator was 4.780 Kilograms. Our tails, 4.462 Kilograms, were wasted. The concentrate weighed .318 Kilograms or 6.66 per cent of the feed or 4.48 per cent of the original sample. We also had that concentrate assayed for iron and

and we got an iron assy of 18 per cent. Converting this back to the original sample we have an iron content of .81 per cent. another quarter fraction from the splitter we took

Tr. Proc. H.E. Pg. 56, Lines 1 - 25

.... to the table again. Our feed weighted 5.040 Kilograms. Our concentrate weighed .320 Kilograms after drying and the tails calculated at 4.810 Kilograms were wasted. Our concentrate weighed .230 Kilograms. This was 4.56 per cent of the feed and 3.06 percent of our original sample. This concentrate was assayed for iron. It ran 25.60 per cent iron and converting that back to the original sample we have .78 per cent iron. Summarizing this material --

Q. Which Exhibit?

A. This is Exhibit 22.

Q. That is the flow sheet. Now you are summarizing that on what?

A. On Exhibit No. 20. It shows that the cubic yards of ore required to produce one long ton of concentrate is 19 yards of alluvium would be required to produce one long ton of concentrate, and the theoretical value of the iron in the alluvium there is .208 dollars, or 20.8 cents per yard of alluvium. Sample No. 3, Contestant's Exhibit No. 23, from the Canada del Ora placer mining claim. The sample weighed 84.50 pounds. This was screened on a 10 mesh screen. Plus 10 mesh material was wasted. The waste material weighed 21.25 pounds which was ...

Tr. Proc. H.E. Pg. 57, Lines 1 - 25

...25.15 per cent of the sample. Minus 10 mesh material, 63.25 pounds or 74.85 per cent of the sample went to the splitter. Three fourths of the material from this sample was saved and one-fourth went to the magnetic separator. Our feed to the separator weighed 6.750 Kilograms and the tails wasted weighed 6.357 Kilograms. The concentrate weighed .395 Kilograms which was 5.82 per cent of the feed to the separator, or 4.35 per cent of the original sample.

This was chemically assayed, also, and it ran 42.10 per cent iron which would be 1.83 per cent iron in the alluvium. Now summarizing No. 23, Exhibit 23 on Contestant's Exhibit No. 20 it shows that 20 cubic yards of ore would be required to make one ton of concentrate and that this material, the alluvium, would have a value there of .476 cents per cubic yard for the iron content.

Q. You have a note on Exhibit 20 with respect to sample No. 3.

A. Oh, yes, yes, I am glad you mentioned that. Sample No. 3 was taken in the clean sand in a meander of a wash in the north-east quarter on that Canada del Ora claim. This was done in order to determine what the content of iron would be in these clean sands where the

Tr. Proc. H.E. Pg. 58, Lines 1 - 25

.... black sands appeared to be concentrated and it is not considered representative of the alluvium on the claims.

Q. Why not?

A. Because, due to the action of water and wind and so forth, the black sands have become concentrated because they are heavier. The lighter material has been washed on down the wash and in meanders and places like that you will find that the heavier minerals, since the current slows down, they tend to fall out and you will have a concentrate of your heavier minerals.

Q. Does that necessarily mean you couldn't have a concentration all over the entire claim?

A. It means that you could not have a concentration all over the claim like you had here in the wash because you have not had this water action, water carrying capacity, on all the claim. It is only in the washes where it is moving material in flood times.

Q. Would you say on this particular claim, in this particular area you have sampled, it is isolated concentration on the claim?

A. Yes, I would.

Q. Is that the reason why you did not consider it a representative sample?

A. Yes, that is true. We wanted to cut a sample in the wash because.

....

Tr. Proc. H.E. Pg. 59, Lines 1 - 25

Mr. Allen made the statement that if he did start mining it would be no doubt in the wash because of the higher concentration of heavier minerals there. Going now to Contestant's Exhibit No. 24, Casa Adobe placer mining claim. This sample weighed 65.5 pounds. It was also screened on a 10 mesh screen. Plus 10 mesh material was wasted. It had a weight of 21.25 pounds which was 32.48 per cent of the sample. This was all discarded at this point.

Pr. Proc. H.E. Pg. 60, Lines 1 - 10

This material, this concentrate, was chemically assayed and ran 24.10 per cent iron which showed by calculating back that the alluvium or the original sample would run 1.18 per cent iron.

Tr. Proc. H.E. Pg. 61, Lines 1 - 4

Turning now to Contestant's Exhibit No. 26 and Contestant's exhibit No. 25, which are chemical assays from the Arizona Assay Office, and referring to Contestant's Exhibit No. 24 where we show that one-fourth of the minus 10 fraction went to the table, we go to this exhibit. This fraction weighed 5.040 Kilograms. That was fed to the Wilfley-type table. The tails were calculated to be 4.723 Kilograms and that was wasted. We made no effort to save those tails.

Tr. Proc. H.E. Pg. 61, Lines 10 - 18

From the dryer this material was run through over a 20 mesh screen. The plus 20 mesh material went to the binocular microscope which showed again the large grains of feldspar and quartz with tiny fractions of specks of

Tr. Proc. H.E. Pg. 61, Lines 22 - 25

... heavy black mineral locked in. The minus 20 mesh fraction, which was .276 Kilograms or 87.5 per cent of the concentrate or 3.72 per cent of the original sample, we ran through the magnetic separator.

Tr. Proc. H.E. Pg. 62, Lines 1 - 5

The material was very nearly split half and half into magnetics and nonmagnetics as a result of this test. The magnetics were sent in for a chemical assay for iron and titanium. We got an assay of 52 per cent iron and 9.36 per cent titanium, as shown on Contestant's Exhibit No. 25.

Tr. Proc. H.E. Pg. 62, Lines 12- 17.

Our nonmagnetics were chemically assayed for titanium, zirconium, silver and gold. Our chemical assay shows there was .4 of an ounce per ton of silver, .21 of an ounce of gold per ton, 3.22 per cent titanium and ...

Tr. Proc. H.E. Pg. 62, Lines 22 - 25

Going further under this exhibit 28, and here again we have given the locator every benefit of the doubt, we have used the value of iron in this particular exhibit as 60 to 68 per cent of iron because they can make a concentrate that will run between 60 -- higher than 60 per cent iron if concentrated down far enough, so we have used the figure 60 to 68 per cent iron from E. & M. J., which is a Swedish magnetite imported, which shows a value of \$11.50 per long ton which would be 52 cents per pound. The ilmenite, has a value of \$21.00 per short ton or 1.05 cents per pound. Garnet of the abrasive grade, which has to have angular edges, sharp edges so it will cut, is selling for about \$ 87.50 per short ton. That figures down to 4.29 cents per pound.

Zircon and they quote in E. & M.J. that the start Florida concentrate ore which is recovered from beach sand and has a 66 per cent ZRO2 content, they quote this at \$47.25 per short tone. This figures out to be 2.36 cents per pound. Monzite, now this figure is based on the ...

Tr. Proc. H.E. Pg. 68, Lines 5- 25

... J. R. Simplot Company sales when they had a government contract, which is published information. They were getting 10 cents a pound for this material. Sphene or titanite has no economic value. It is not quoted in E. & M.J. Now, the gross value per cubic yard of the alluvium, and this is the maximum theoretical value of the ore based on 100 per cent recovery which nobody is going to get anyway, but we did that again to give the locator every benefit of the doubt. The magnetite, 26.55 pounds time 52 cents a pound figures out to 13.81 cents per yard of alluvium. The ilmenite is 8.33 pounds at 1.05 cents a pound and that gives us a value of 8.75 cents for our ilmenite per yard of alluvium. Garnet, 5.45 pounds at 4.29 cents a pound gives you a value of 23.29 cents a pound. Monazite, 1.25 pounds at 10 cents a pound gives us 12.50 cents. Zircon, .36 pounds at 2.36 cents per pound gives us a value of .93 cents per yard, so we come up with a total theoretical value, if you could sell all of these various things, of 59.28 cents per yard of alluvium.

Tr. Proc. H.E. Pg. 69, Lines 1 - 23.

Q. Now, would you tell us for the record what the comparison is between these three studies as to the value of the material to be found on the claims in question?

A. Yes, I would like to point out that our studies showed that the magnetite, for instance, the magnetics here on this sample that we obtained, ran about from, number four, the magnetics ran 1.81 per cent of the total sample and this of course would include some titanium which is also magnetic and Mr. Evan's magnetite content from his number two minus 10 mesh sample showed a content of 1.25 per cent magnetite and the J. R. Simplot Company report shows 1.02 per cent magnetite, so all of these three different methods show the magnetite to be slightly more than 1 per cent and they all three point up the fact that the heavy minerals, with the exception of the one from--

our samples all show that the heavy minerals run about three, between three and five per cent, from three to four and a half or three to five percent heavy mineral. Mr. Evan's testing, done by a different method, shows 3.4 per cent heavy minerals and the J.R. Simplot Company test showed quite a little less. Their heavy mineral is 1.8 per cent. That is less than two percent heavy

Tr. Proc. H.E. Pg. 73, Lines 4 - 25
... mineral.

Q. Substantially, then, your results were verified by the Evans and Simplot reports?

A. Yes. I would like to mention also that this composite sample from the well, which was a sample from the cuttings -- we don't know how deep the well was, but it was reported to be about 250 feet.

Q. Reported by whom?

A. By Mr. Collins. It would be about 250 feet and we know from checking all the United States Geological Reports from wells in the vicinity that it could have been much shallower and gotten water and we know it pumps water because Mr. Allen told us it pumps about 28 gallons a minute, but that sample taken from that depth shows the magnetite content to be about 1.1 percent and a total heavy mineral of three and a half percent, so these things are all very close and the comparison, I think, is very good.

Tr. Proc. H.E. Pg. 74, Lines 1 - 17

CROSS EXAMINATION

A. No we also did chemical. We did chemical analysis to determine the per cent --

Q. Did you do those things?

A. I did not do the chemical analysis, no.

Q. Then you were pit engineer. Does that also entail digging the holes under supervision?

A. No. I laid out the drag lines-- laid out the well for the material excavated from the wells and pumped it to the plant for processing. Every week we would do our surveying and then calculate in the office the yardage removed and the stripping done to arrive at our production for the past week.

Q. You didn't determine where you were to dig from your own observation of mineral content, did you?

A. These drill holes that I spoke of told us where to dig. I took that information from the drill holes and completed it on maps showing the depth of the matrix which was the ore and then we decided where to move our mine.

Q. You used the term "We".

A. I mean myself and about eight other engineers and the chief engineer in the engineering department. We did various jobs. At one time or another we worked together, and so forth, which is normal in a mining operation.

Q. You say that you went out on the land on various

Tr. Proc. H.E. Pg. 125, Lines 1- 25

...occasions including October 6th, October 8th, and February 17th. Despite that fact you said that you found one riverbed; is that correct?

A. I said there is one large wash that crosses the south half of the section, yes, from the east to the west, but there are numerous other small washes which are not of much consequence. They are not as large as the large one anyway.

Q. But there is one--oh, about half the size, running to the north of the main wash?

A. Yes. I took a look at that yesterday. I walked over that a previous time, but not yesterday.

Q. It is well on the norther half of the section, isn't it?

A. Yes, that is where one of our photographs shows that we cut a sample, was in that wash.

Q. Was it in that wash that you cut your sample then?

A. Yes, on the northeast quarter of the section.

Q. That was the only river sample that you cut?

A. That is true.

Q. Now then, you cut four, five samples in all; is that correct?

Well, I will say that you cut four single samples and then you made a composite of well drillings.

A. That is true.

Q. Now, your single samples were one foot deep by one foot square.

Tr. Proc. H.E. Pg. 126, Lines 1 - 25

A. Approximately.

Q. You made no composite of those?

A. Of those four?

Q. Yes.

A. No. We have the results for each separately. You can make a composite of that. It could be done.

Q. Each one was in approximately the middle of a quarter section?

A. Yes, right in the middle.

Q. How did you determine that?

A. We determined that--I say "we", J. August Ash, myself and Mr. Allen were along. We drove in the jeep from a certain point on to the claims and we even once went so far as to pace down to the section line from the fence to see how far we were from it and then we went to a corner and drove back to what we thought was the center of the section. We didn't do it exactly or I would have taken along a transit. We did it in the center of the section since Mr. Allen said it made no difference where we sampled, so we thought we would take it about in the middle and we took it about in the middle.

Q. Is this the way you usually take samples for a placer claim?

A. For a placer claim this is the normal way to sample if.....

Tr. Proc. H.E. Pg. 127, Lines 1-25

.... you don't have any cuts or pits exposed.

Q. But you just touched the surface.

A. We sampled the top foot or foot and a half of surface. That is true. That is all there was available to us to sample.

Q. Do you believe that you had enough ore there to give a fair test?

A. Enough ore?

Q. Enough dirt there to give a fair test.

A. That test is as fair as we could do with what we had to work with. What I mean by that, we had no cuts or pits. The only thing that was available was the surface, you see.

Q. I notice on Contestant's No.27, on the very last page there is a paragraph. I would like to read it. It says, "It should be noted that the sample submitted for examination was extremely small. Some of the fractions containing valuable minerals (i.e. No.1, page 2 above; No.4, page 3 above) weigh so little that true evaluation cannot be done at this point. If the sample submitted represents material taken from one location only it means very little; however, if it is a component sample, or a number of samples thrown into one then it means a bit more. "To truly evaluate a piece of ground for heavy minerals a number of one-cubic foot samples should be examined."

Tr. Proc. H.E. Pg. 128, Lines 1 - 25

Now this is a quotation from your own reporting.

MR. AHO: There is no question there before the witness. It is merely a statement.

MRS. GIRARD: No. I was just reading that.

THE WITNESS: I might say I was aware of that.

BY MRS. GIRARD:

Q. You were aware of that.

A. Yes, I read that report, but I believe it was mentioned earlier where a composite sample would not be a true sample.

Q. Where did you read this?

A. I didn't read it, I think I heard it here this morning.

Q. Well, that is strictly heresay. As I asked Mr. Evans before, were you the miner in this instance would you feel that you had been fairly treated if a sample such as this had been taken to prove the value of your claim?

A. If I were the miner in this particular land I would do some prospecting. To truly evaluate that land there should be a hole put down in each quarter section and if that shows something interesting then in each forty, then in each twenty, then in each ten and so forth.

Q. Thank you. You have answered the question.

Tr. Proc. H.E. Pg. 129, Lines 1 -22

Q. Did you usually notice a difference in the type of dirt brought up from each separate depth?

A. I believe that is normal that each depth varies. You may find a few feet of loose sand and gravel and you may find a few inches of, maybe silt and then maybe some coarser

Tr. Proc. H.E. Pg. 130, Lines 21 - 25
.... gravel.

Q. Then what is on the surface may not necessarily be 10 or 30 feet down?

A. I believe that is true.

Q. Now then, not being able to see down into something, you cannot tell whether or not there are 40 feet of worthless material as compared to 10-- or the other way around, do you feel that a composite of a single hole is adequate evidence of anything?

A. I think it is adequate evidence --are you referring to drill hole samples?

Q. Yes, I am.

A. Yes, I think that is adequate evidence of the material within that immediate area.

Tr. Proc. H.E. Pg. 131, Lines 1 - 14

Q. And now, in this particular case you were not there when the well was dug so you could not take a sample every so many

feet as the dirt was brought up. Instead, you went out and you dug down through the material that had been deposited from the well, did you not?

A. That is true.

Tr. Proc. H.E. Pg. 131, Lines 20 - 25

Q. In your estimate, then, it was quite hypothetical that you had no actual knowledge of how the area would be mined. You were going on means used in other places under different circumstances.

A. I was basing it on my experience in this type of work.

Q. You have done none of this type of work in Arizona.

A. That is true. I have done no dredging in Arizona.

Q. Not necessarily dredging, but mining in Arizona, placer mining.

A. No, I have not done any placer mining in Arizona. That is true.

Tr. Proc. H.E. Pg 144, Lines 5- 15

Q. Just the surface that is. At any rate, getting back to the magnetite and the

Tr. Proc. H.E. Pg. 144, Lines 24-25

....fact that you do not know of its being mined, did you ever hear of any mining of copper as low as .3 to .6 per cent before?

A. Oh, yes. They mine .3 to .6. They try to have a cut over point nowdays of about .7.

Q. But 20 years ago they did not?

A. That is true. They were mining the higher grade.

Q. Would you say that new machinery was being developed every day which expedites the mining og small quantities of ore at a profit.?

A. That is true. They are developing more and better machines all the time.

Tr. Proc. H.E. Pg. 151, Lines 1- 12

TESTIMONY OF WILLARD C. LACEY, WITNESS for the GovernmentDirect Examination

Q. Of what did your examination consist?

A. I--as I say, I walked over the area looking for evidence of sand concentrations in the washes.

Q. That was right on Section 19?

Tr. Proc. H.E. Pg. 81, Lines 22 - 25

A. That was on section 19. This is usually an indication of heavy mineral content of the sands. As you get concentration in the washes a skin of black magnetite gives indication that the material is in a higher than normal concentration in the sediments. I could find none of consequence. Then, I went to the fan that was the sediment that was derived from the well and cut a little sample from the side of each one of the shovel cuts so I ended up with a sample of just about two and a half pounds derived from the small cuts along the sides of these holes. These consisted primarily of the sand fraction because the clay fraction, being a little bit lighter and carried in suspension a little bit easier, was washed on out, so there was a little higher concentration of the sand in the specimen than would actually be obtained in any mining operation.

Q. You would not consider that a true representative sample of the material to be found on the lands?

A. It is representative sample of the sands, but it does not represent all of the clay fraction which would be found in the actual mining. They will find a higher percentage of clay which will tend to make mining a little bit more difficult and the clay fraction does not carry the heavy mineral components. I took this sample back to the University and ran it over a Wilfley table, made a rough concentrate of the heavy

Tr. Proc. H.E. Pg. 82, Lines 1-25

.... mineral components and then took this rough concentrate and ran this through a sink float separation using carbon tetrabromide which separated those minerals that had a specific gravity under 2.65 from those that had a specific gravity over 2.65, so it made a clean separation between the two. Then taking the zinc fraction, the heavy fraction, I took a magnet and separated out the magnetic fraction which contained the magnetite and then examined it under a microscope the non-magnetic fraction and made a number count on the nonmagnetic fraction. Now, by keeping track of the concentrates all the way through, the concentrates of the initial sample and the concentrate from the table and the percentage of this that went into the zinc and the amount that came out in the magnetics I was able to collate back to the exact percentage of each of the mineral components in the original sand. Would you like those percentages?

Q. Yes, if you please, Doctor.

A. I found that the combined magnetite and ilmenite ran 1.2 per cent. This fraction contained approximately one per cent titanium, so it was -- it contained probably eight to 10 per cent ilmenite of this 1.2 per cent. There was .03 or 3/100th of one per cent limonite, 25/100th of one per cent argentite.

There was one-tenth garnet and

Tr. Proc. H.E. Pg. 83, Lines 1-25

... and incidentally the garnet occurred in small rounded crystals. The small rounded crystals are not considered to be of any commercial value. The commercial garnet is coarse garnet that has to be crushed into very angular particles so it serves as an abrasive epidote. There was 15/100ths hornblende, 6/100ths lucocite and sphene 5/100th zircon, .01 percent. This is the percentage.

Tr. Proc. H.E. Pg. 84, Lines 1-7

A. ... figuring it back to value per cubic yard of sand, you have a value of twenty cents per cubic yard and this is the maximum value that you could assign to this sand on the basis of my studies, twenty cents per cubic yard.

Now, the cost for extraction is variable. This will depend on the size of the opening and the mechanisms by which you attempt to separate the minerals...

Tr. Proc. H.E. pg. 86

... Assuming one per cent of this was magnetite we come up with--- and convert it over into long tons, there are about 3,500 long tons of magnetite per acre which might net or which might gross, I should say, about \$59,000. This would be the gross value of the magnetite per acre of land.

The cost to extract it on the basis of my estimates, including a wasting cost for the clay, would come up somewhere in the vicinity of \$466,000 per acre, so my calculations on the operation in section 19 would be that they would end up with a net estimated loss of \$06,000 per acre.

Q. Assuming that there were recoverable minerals of value on the lands in question, what process or mining method would be used ordinarily to recover those minerals?

A. That depends entirely upon the scale to which the mining operation reaches. If it is a fairly small operation, merely a shovel and a truck hauling would probably be the most economical way of handling it.

Tr. Proc. H.E. pg. 89, lines 1 - 17

About the only thing that you can figure of any value is the magnetite. The magnetite would have to be cleaned up to remove the little bit of ilmenite.

Tr. Proc. H.E. Pg. 85, Lines 2-4

Cross Examination

Q. Did you take any samples from the sand in the river beds?

A. I did not take samples from the sand in the river beds, Ma'am. After you have looked at hundred of sand placer deposits you come to realize that when there is a concentration of better than two to three per cent you begin to get the natural concentration taking place on the surface in this skin. This is almost a universal relationship.

Q. Did you do anything such as digging?

A. The holes were dug in the fan material.

Q. But not in the river bed?

A. One of the best samples that we have of that area is where the well went down and the fan material from the well. This represents the sample down to the bottom of the well. The holes were cut down through the entire layered material that came out.

Q. I am asking about the river bed though. Did you do any digging in the river bed?

A. No, Ma'am.

Tr. Proc. H.E. Pg. 93, Lines 8- 25

Q. None at all, the only digging you did then, was in the well material?

A. That is right.

Q. How many holes did you dig in the well material?

A. There were, I would guess, approximately a dozen to 15 holes in this fan derived from the well.

Q. Did you dig them?

A. I did not dig them.

Tr. Proc. H.E. Pg. 94, Lines 1 - 8

Q. You were stressing the point that the magnetite was about the only commercial mineral found.

A. Yes, Ma'am.

Q. And you were indicating that the primary use of this

Tr. Proc. H.E. Pg. 96, Lines 22-25

... magnetite would be smelting or making iron or steel out of that; is that correct ?

A. Yes, Ma'am.

Q. Are you familiar with the "H" iron process?

A. The which?

Q. The "H" iron process.

A. I am afraid you have me there.

Q. It is a hydrogen process wherein hydrogen is put into a kiln under excessive heat. You can put powdered iron or magnetite in and steel will come out. Naturally it has to be of a certain consistency, but that is what it is, primarily.

A. Still, whatever you sell in the way of magnetite must sell on the competitive market irrespective of what happens to it or how it is used. It must compete economically with the other magnetite composites of the world.

Q. Since you are not familiar with the "H" iron process, neither would you be familiar with the value of this particular magnetite to that process so I wanted to ask you that question. Are you familiar with any other uses for magnetite?

A. The principle use for magnetite is as an iron ore. This is the only bulk usage of magnetite.

Q. Have you ever heard of it as a flotation substance to name--

A. Oh, it is used for making sink float formations. You....

Tr. Proc. H.E. Pg. 97, Lines 1-25

.... grind it up and you mix it with--you mix it to make a suspension for a sink float process, yes. This is a minor usage.

Q. Do you know how much a pound is that minor use?

A. You can go ahead and quote it, I don't know.

Q. I shall not. We will wait until a later time. Let's see, you took this one sample from the well and you ran it over the Wilfley table and you tested the heavy material from that; is that correct?

A. That is right.

Q. And you gave that what kind of an examination?

A. Examined it under the petrographic microscope.

Q. Which determines what?

A. Which permits me to tell what minerals are present.

Tr. Proc. H.E. Pg. 98, Lines 1 - 14

Q. Season after season we have rains out here and the new layers are laid down. Is it not possible to find layers beneath layers.

A. This is true, but there is also the layer on top and the material tends to get stirred up by each successive rain and in the region of --you see, the stream, as it goes down, there are areas of cutting and there are areas of filling and in certain areas of cutting you can get little concentrations and I didn't say there weren't any because there are a few places there where you can get a small skin of this material, but it is not indicative of an area in which you have placer sand deposits. These tend to be wide spread.

Tr. Proc. H.E. Pg. 100, Lines 9-20

A. Concentration occur where you have the cutting away of banks by stream action or material being fed into this bank action of the stream and the separation of the heavys from the lights.

Q. Now, by this you are referring to the concentration in the stream alone, I take it?

A. This is concentration of the streams and this is how the concentration in the sand occur. These were the columns of sand fill. These were concentrated by streams, by wandering streams that carried the lighter material further than they did the heavy material.

Tr. Proc. H.E. Pg. 101, Lines 12- 25

Q. That was what I was getting at. When you take a pan of dirt, say, when you wash it, as you know the heavy material concentrates in one place largely depending upon the wash of the water and the slope of the pan. Also, with the slope of the land, wouldn't the mineral concentrate in one particular spot?

A. No, because these streams meander back and forth. They are also going downhill. This is customary for streams, but they will meander back and forth. They don't hold to a single channel.

Q. You say the streams ran in different channels. Do you really believe it was streams that laid down the ore there on Section 19 or was it a hugh body of water at one time?

A. No, I believe this was alluvial material laid down by streams draining from the Catalina Mountains.

Tr. Proc. H.E. Pg. 102, Lines 1-16

Q. I'm trying to show that by taking one sample from the well you have not accurately determined the mineral underlying the entire section because it would be laid down in varying levels depending upon the slope of the land at the time when the streams washed across.

A. If a deposit of this character where you have the wandering back and forth of the streams, true you may get variations from one section to another in individual layers but

statistically I believe that you would find that there was very little difference because what one stream lays down at one instance, at one place, it will lay down somewhere else at a slightly different time. It more or less equalizes itself. It tends toward uniformity in a process that is not necessarily in itself uniform.

Tr. Proc. H.E. Pg. 106, Lines 11 - 24.

Q. I would like to ask one other question, please. I would like you to look at this ore. I don't know that it is any that I --

A. Are you sure it is ore?

Q. Sand, I am sorry.

A. I am a stickler on this business of ore because ore means you have to make a profit on it, so we don't use the word ore unless it is indicated that you can make a profit.

Q. This is mineral bearing rock?

A. Mineral bearing rock, that is right.

Q. Would you like a magnifying glass?

A. I have one, thank you.

MR. AHO: For the record Doctor, would you state what what you are doing?

THE WITNESS: I am trying to separate out a little of the heavy components by a dry magnet so I can see a few more of them closely together.

MR. AHO: And you are now looking at the material through what type of an instrument?

THE WITNESS: This is only 10 magnification hand lens which isn't quite adequate. Do you have a higher magnification there? Actually you should have a couple of hundred magnification to do an adequate job.

By Mrs. Girard:

Tr. Proc. H.E. Pg. 112, Lines 1 - 25

Q. Will this help?

A. No, I think mine is better than that. There are a number of techniques you use for identifying minerals, immerse in oils or immersion in a medium of a given index is one of the best methods. For example, if you take, like I did here, and mounted the mineral grams under a flass slide in an index liquid of about 155, then any quartz material more or less disappears because its index is the same as the mounting liquid. If you had apatite, the apatite stands up with a little relief. If you had zircon, it stands up with a very high relief. This is the tool you use. I just wanted to point this out. This is a rather crude method of mineral determination. This seems to be weathered garnet material that contains magnetite primarily.

Q. Would you care to estimate anything as to its value?

A. No, Ma'am, I wouldn't.

Q. Not even with the naked eye?

A. Not even with the naked eye. If I saw this much magnetite in the sand I would continue to look.

Q. That is what we thought, thank you.

Tr. Proc. H.E. Pg. 113, Lines 1 - 21

TESTIMONY OF GLEN ALLEN, Witness

DIRECT EXAMINATION

A. In the past two years I have been taking claims and testing and working on mostly iron ore.

Q. Where are these deposits located?

A. Pima and Pinal Counties.

Q. Approximately how many claims would you say you have staked?

A. For myself and other people I have probably staked in the neighborhood of a thousand claims.

Q. Could you give us some idea of the extent of this ore, where it is located and the approximate type?

A. The largest deposit is located in Pinal County north of Owlhead and there is approximately--there is an area there where there are several companies involved. They have about one hundred fifty sections and it is mostly magnetite.

Q. The same as your claims?

A. Yes.

Q. When did you first go to the section of land in question today?

A. The first time I was there was probably about a year and a half ago.

Q. Who was with you? I should say, was anyone with you?

A. I don't believe so at that time.

Q. What did you do at that time, Mr. Allen?

A. I looked at it, the property, but I just looked at the property in general and I inspected it.

Tr. Proc. H.E. Pg. 172, Lines 1 - 25

Q. By that what do you mean?

A. Well, I was interested in the different ores or to see if I could find any magnetite or other valuable ore.

Q. Could you describe the section generally according to the boundaries around it.

A. Well, it has several washes, one main wash running east to west. It is almost flat.

Q. Could you say what its boundaries are; that is, the other objects around it which might help one find it, where they are located and what they could look for?

A. On the east is Thornydale Road and in the middle of the section, Overton Road ends at Thornydale in the center of section 19.

Q. You said you were on it about a year and a half ago.
When did you return next?
A. I believe it was last July.
Q. Was anyone with you this time?
A. Yes, William Hazel and my wife.
Q. In what capacity was Mr. Hazel with you?
A. Partner.
Q. What did you do at that time?
A. I believe it was -- we just looked at the section the first time and I think it was later, I forgot the exact date that we went back and staked it out.
Tr. Proc. H.E. Pg. 173, Lines 1 - 25
Q. When you staked it out, on what did you base your claim?
A. We took samples at different spots and checked it for mineral content and Bill Hazel has studied geology at the University and he was more acquainted with the crystals and minerals other than magnetite where in my experience I could only tell magnetite as being whatever a magnet would pick up.
Q. When was it that you took the samples, approximately?
A. Well, it was a few days before we staked it.
Q. And was Mr. Hazel with you at the time you took the samples?
A. Yes.
Q. What did the samples reveal to Mr. Hazel?
A. Well, he was excited and claimed the different minerals that I wasn't acquainted with at that time, so--
MR. AHO: I object to any expression of opinion as to Mr. Hazel's feelings or his expressions as to what minerals allegedly were in the material found on section 19.
HEARING EXAMINER STEINER: Overruled.

By Mrs. Girard:

Q. In any event, I will ask you, did the opinion that Mr. Hazel expressed to you give you any confidence in your claim?

A. Well, yes, but I had enough confidence in knowing meself there was enough magnetite to mine at a profit.

Q. You found magnetite then, and anything else?

Tr. Proc. H.E. Pg. 174, Lines 1-25

A. Garnet, which I could recognize, garnet and that is about all.

Q. Subsequent test revealed other minerals. For the sake of letting this evidence in, these reports on which this testimony is based will be admitted later. What other minerals did subsequent reports reveal?

A. Vanadium, titanium, zirconium and a few others.

Q. Now then, you are familiar with the terrain?

A. Yes.

Q. If you were to mine this section, where would you begin?

A. I would probably high grade the washes to begin and then any other spots on the land that show higher concentration.

Q. What processes would you attempt to use?

A. Well, I believe I'd have a choice between dredging or some new dry separation method.

Q. Why do you mention dredging?

A. Because it is a cheaper method, the cheapest method to mine.

Q. On what do you base your testimony?

A. Well, I have had experience with dredging in New Mexico and have pretty well been acquainted with quite a few dredging operations in the United States.

Q. What kind of an operation did they have in New Mexico?

A. We had a floating washing plant that we fed with a
Tr. Proc. H.E. Pg. 175, Lines 1 - 25
... drag line.

Q. Have you any idea how much it would cost you to dredge?
A. Our costs there were pretty high but they were under thirty cents a yard.

Q. Do you have any estimates from anyone as to how much they would charge you to dredge?

A. I did quite a bit of checking and Thurman and Wright, I had an estimate from them that would cost between ten and fifteen cents for a suction dredge.

Tr. Proc. H.F. Pg. 176, Lines 1 - 9.

Q. You mentioned other dry processes. What other dry processes would you use?

A. I think the one process is a new process that Base Metals is using in Nevada. It is a prototype dry operation that they would have to run about a hundred yards an hour and their figures are between twenty-three and twenty-five cents a yard.

MRS. GIRARD: Would you mark this for identification,
Please.

Tr. Proc. H.E. Pg. 176, Lines 1 - 25

(The document referred to was marked Contestee's Exhibit A for identification.)

MRS. AHO: What is the name of the magazine from which it was taken?

Mrs. Girard: Just a moment. I will identify it.

Q. Mr. Allen, have you even see this before?

A. No. I knew about the process through a friend of mine that does the writing for Mining World.

Q. Did he give you this?

A. No. I take the book and he wrote the article and I had talked to him previous and I was expected to go down and look at their operation about a month ago and I didn't have the opportunity to go.

Q. In other words, you gained your information from his talking with you.

A. Yes.

Q. Then, this you are offering merely to substantiate his words since he isn't here.

A. And costs for dry separation.

Q. Then, have you ever seen this before?

A. The process, no.

Q. I mean the page.

A. Just when I bought the book, but I knew about the equipment before it came out.

Q. Yes. From what book did you take this?

Tr. Proc. H.E. Pg. 177, Lines 1 - 25.

A. Mining World. I believe it is the last issue, March I believe.

Q. Could you read us briefly what it says under the picture?

A. "Recovery of from 75 to 85 per cent of the gold in the feed is claimed for the new type of dry placering equipment pictured above. W. F. King, President of Base Metal Production, Incorporated, with headquarters in Las Vegas, Nevada, reports that the unit with only a 12 to 14 yard per hour capacity is too small to be commercial. Therefore, plans call for building a 100 yard-per-hour unit. He estimates operating cost of the larger unit at \$0.23 to \$0.25 cents per yard. The Allis Chalmers front end loader is used to dump the gravel directly in feed hopper. It is also used to stockpile oversized boulders from the grizzly."

Q. When they said they used this on gold mining, do you think it would be commercially usable for gold?

A. No. It will work on any heavy minerals.

Q. How much does it cost per ton to use, could you estimate?

A. Well, to -- well, it figures there twenty-three to twenty five cents per yards.

Q. Thank you. I offer this in to evidence, then.

MR. AHO: I don't believe they have identified the publication from which this was taken.

THE WITNESS: Mining World.

MR. AHO: That is the name of the magazine

Tr. Proc. H.E. Pg. 178, Lines 1 - 25.

... Mining World?

THE WITNESS: Yes, published in San Francisco.

Mr. Aho: Does it give the month there of publication?

THE WITNESS: March, 1960, issue. That is the last issue, I believe. It is March.

Mr. AHO: If it is a page from a magazine I will accept it as such, but I am not verifying any information in there.

HEARING EXAMINER STEINER: YES.

Tr. Proc. H.E. Pg. 179, Lines 1 - 10

Q. Mr. Allen, do you know of any other dry processes?

A. Yes, there is another new machine being developed by Herb Brockley who lives in Fremont, Ohio, and the machine is over at Chapman Dyer having a few changes made.

Q. Where is Chapman-Dyer?

A. I believe it is on -- it is on the other side of the railroad track between 18th and 19th, I believe.

Q. But is it in Tucson?

A. In Tucson, and the machine is there and they have been running several tests and it will concentrate dry or wet.

Tr. Proc. H.E. Pg. 179, Lines 16- 25.

Q. Have you seen toe machine in operation?

A. Yes, and it will save about ninety-nine per cent of the gold and it will concentrate all heavies and it is only a test model, but they believe they can build one of commercial size that will separate for between twenty and twenty-five cents a yard.

Q. To the best of your knowledge, would that machine work on the section in question?

A. Yes, it would, and working the type of machine like this we wouldn't have trucks to haul to a plant and all the expense of hauling to a plant and hauling material way. It would be set up in a pit where you would feed with a front-end loader or a shovel or drag line, and then it would stockpile the waste at the other end of the pit and it would be portable and keep moving.

Q. Now, then, you mentioned various type of machinery which you might use. Generally, what type of a mining process would you go into, that is, on what scale would you mine the area?

A. Well, to begin with I would have more of a pilot plant, a small operation to work out the--whatever would be the best, because once it is concentrated there is several methods of segregation on the concentrates and between Denver equipment and Humphries Spirals and two or three others, it would be a matter of quite a few tests to

Tr. Proc. H.E. Pg. 180, Lines 1 - 25

....determine which would be the most feasible.

MRS. GIRARD: At this point counsel would like to say that the objection stated the other day to the amount of evidence necessary to prove the case is still objected to by counsel on the ground that United States versus

Foster is not applicable to this situation. In that case they had a sand and gravel containing nonmetallic mineral. Ours contain metallic mineral as is stated by the contestant. Although I am bringing in evidence which otherwise had not been necessary, I am not waiving my objection.

Q. To the best of your knowledge, Mr. Allen, is there any market for your mineral?

A. Yes, there are several markets.

Q. What are they? Let's take the magnetite first. For the magnetite, what are your markets?

A. We have several markets that are specialties. One would be for heavy media for a sink float. We have a market, Japanese market, which if we upgraded it all we would have to do is concentrate it and probably ship the concentrate to Japan which would be feasible because they have such cheap labor, or they could separate the values cheaper over there, probably, and then they would make steel and ship it back to Tucson, like most

Tr. Proc. H.E. Pg. 181, Lines 1 - 25

... of the steel they use here.

Q. Are there any other uses?

A. They use it in oil fields in drilling in drilling mud. They use it to make cement to sink pipe on the offshore drilling rigs.

Q. Getting back to its use as a heavy media, is there anything you would have to do to it to make it usable?

A. Yes, we would have to grind it to specifications, minus 325, but then it would have a value of about \$50.00 a ton.

Q. How about the difficulty? How difficult would it be to grind it?

A. The cost would be very low.

Q. Would you have to separate all the other minerals that are there, from it?

A. No, we wouldn't. We probably would because they are more valuable.

Q. Take the titanium for instance. Would that be necessary?

A. No, because it is the same weight and they are interested mostly in the weight.

Q. In regard to the garnet, are there any uses that you know of.

A. Mostly as abrasives and as finishing and using to top off cement so there is no slippage or wear because of the hardness.

Q. Do you have any idea how much per pound you could get

Tr. Proc. H.E. Pg. 182, Lines 1 - 25
...for your garnet?

A. Well, I know in Tucson they have to pay about twenty-two cents a pound for it.

Q. Now as to the magnetite, is there any way it could be used for iron or steel?

A. Yes, there is. They have several direct new processes, direct reduction.

Q. Such as?

A. Well, I believe the best one is "H" iron.

Q. Could you give us some brief description of this "H" iron process.

A. With the "H" iron process it was developed by Hydrocarbon and Texaco, and I believe the owners of it now is Hydrocarbon and Bethlehem Steel.

Q. Are there any plants in operation at this time?

A. Yes, they are Allen Wood who has a plant and Bethlehem is building one in Los Angeles and then they have a couple test plants.

Q. Where did you get your information about the "H" iron process?

A. Through Hydrocarbon.

Q. That is through correspondence with them?

A. Yes.

Q. Does Magnetite have any particular qualities that make it useful for that process?

Tr. Proc. H.E. Pg. 183, Lines 1-25

Yes, It is a process where they use the natural gas to make hydrogen and it has several advantages because using the fines, they use the magnetite and it will reduce in about half the time of hematite, and then on the factor where there is fifty-two per cent, I think Mr. Clemmer's figures were fifty two percent iron and nine per cent titanium, where it may be detrimental in the "H" iron process, in the process of taking the oxygen from both titanium and the magnetite it would give you a steel power which on the market is worth about \$120. to \$160. a ton, and it would give you a titanium metal which would be worth about \$1.50 per pound, so you have increased value there over any other operation such as blast furnace, which is actually obsolete.

Q. How much concentrating would you have to do to prepare your ore for the "H" iron process?

A. Well, it would depend on what type--what grade of power you would demand in the finished product.

Q. Did you say there are any of these plants located nearby?

A. There is one being built in Los Angeles.

Q. Do you have any idea how soon it will be completed?

A. No, I don't.

Q. Do you have any idea what its source of market might be?

A. Well, their source of market, I believe, sixty per cent of the steel would be used in the Western United States and

Tr. Proc. H.E. Pg. 184, Lines 1 - 25.

.... and shipped in from either the eastern United States or Japan or some other parts of the world.

Q. And now, then, were you not to use this "H" iron process, is the magnetite suitable for ordinary iron processes?

A. For blast furnace?

Q. Yes.

A. Yes, but it would have to be pelletized and it would have to be used either on the West coast or in the eastern United States and your costs are fairly high on your shipping unless a person would ship through one of the free ports. The port of Peansco has been declared a free port and we are only about two miles from rail, and the cost to either port would only be about a little over a dollar, so connected with water it would still be cheap to ship most anywhere.

Tr. Proc. H.E. Pg. 185, Lines 1 - 14.

Q. In addition to tests, have they done anything else which would expedite the mining of the area? Is there water on the land?

A. Yes. We drilled a well and we have sufficient water to justify a wet separation process.

Q. How deep is your well?

A. I believe it is 360 feet.

Q. What size casing do you have?

A. 10 inch.

Q. Do you know, yourself, how many pounds or tons of water it could pump in a minute?

A. Well, we only have a small pump that will do for our present needs and for small concentrating, but it will pump about 28 gallons a minute, but the well is--the well will produce a lot more water, but I am not sure what the amount will be.

Q. Who drilled the well?

A. Blaine Lord.

Q. What relationship is he to Section 19?

A. He has the lease on it.

Q. Is he a partner?

A. Yes.

Q. How did you raise the money to finish the casing?

A. Through leases.

Tr. Proc. H.E. Pg. 193, Lines 2 - 25

Q. What other equipment is on Section 19?

A. A concentrating table and some bins.

Q. Would these be adequate to mine the area?

A. No, we have -- I am planning to use dry separating machines that Herb Brockley has at Chapman Dyer to concentrate it and from there use the wet table and magnetic separators to separate the values after they are concentrated.

Q. If the machinery is inadequate, why did you put it on this section?

A. Well, it is not inadequate. We just have to have additional equipment.

Tr. Proc. H.E. Pg. 194, Lines 1 - 11

Q. Is there electricity on the land?

A. No. We have a generator which I have had to borrow for the time being and they was supposed to put electric on a couple of months ago and that is holding us up too.

Q. How close is Section 19 to the nearest railroad?

Tr. Proc. H.E. Page 194, Lines 20 - 25.

A. About two miles.

Q. Is it more or less surrounded by access roads?

A. Yes, there are several access roads.

Q. How far is it from Tucson?

A. About 15 miles.

Q. Is there anyone living presently on Section 19?

A. Yes.

Q. Who?

A. The Picketts.

Q. What is their relationship to you.

A. They have a lease and then I hired them to do different work and to be on the property.

Q. Why do you need someone on the property?

A. Well, we need someone to more or less watch the equipment and to do certain work and watchman.

Tr. Proc. H.E. Pg. 195, Lines 1 - 15

Q. Have people been coming on the land and claiming it as theirs?

A. Yes. I believe Mr. Jurko claimed that he owned it--and I think there was Mr. and Mrs. Grimes. They claimed they owned it and was going to shoot anybody that come on it.

Q. And now, if you are permitted to continue on your claim, what is your plan of action?

A. The plan of action is to set up an operation to prove the economic feasibility of mining and extracting valuable ore.

Tr. Proc. H.E. Pg. 196, Lines 1 - 10

CROSS EXAMINATION

A. Well, I am familiar with mostly magnetite.

Q. And I believe you stated you recognized garnet?

A. Yes.

Q. And I believe you said the garnet that is found on Section 19 could be used as an abrasive; is that your statement?

A. Yes.

Q. Did you hear Dr. Lacey and Mr. Clemmer testify yesterday as to the nature of the garnet found on Section 19?

A. Yes. I didn't agree with Mr. Tracey or Lacey.

Q. You say you do or do not?

A. I do not. He said they were rounded crystals one time and the next time he said they only traveled a short ways so they were not, so he contradicted himself.

Q. Do you believe your practical experience outweighs his educational background and professional training?

A. In one sense. They can't be two ways. They can't be rounded and they can't be perfect crystals that only travel a short

It has to be one or the other.

Q. Now I believe you stated that if you were going to start immediate operation on Section 19 you would high grade the washes; is that correct?

A. Yes, where I could probably have a concentration of 5 or 6 per cent.

Tr. Proc. H.E. Pg. 209, Line 1 - 25.

Q. Then you stated you would start on the other area where the material looked promising? Is that right?

A. Yes, there are areas there that I could start that would average 3 or 4 per cent.

Q. What do you mean by "high grading"?

A. Well, the high grading is taking the ore wherever it is the highest mineral content.

Tr. Proc. H.E. Pg. 210, Lines 1 - 7

Q. You were talking about a plant they are building or constructing in California; is that right?

A. Oh, "H" iron plant, yes.

Q. "H" iron plant?

A. Yes.

Tr. Proc. H.E. Pg. 214, Lines 21 - 25.

Q. Do you know where they propose to get their ore?

A. No, I don't.

Q. Do you know of any plans for them to build a plant in Arizona?

A. In Arizona, yes.

Q. Where?

A. At Coolidge.

Q. At Coolidge?

A. Yes.

Q. Is that started or is that talk?

Well, it is supposed to be started. They are supposed to have the property and be started.

Q. Now what was this, your testimony about a Japanese market for magnetite?

A. Yes, I think they have been shipping most of it from Nevada, but there was a ready market in Japan.

Q. Is that magnetite or the straight iron ore they are shipping from Nevada?

A. I believe it is mostly lump.

Q. Lump iron ore, right, not magnetite?

A. Well, it is either magnetite or a combination of magnetite and hematite.

Q. What were you saying about there being a high price

Tr. Proc. H.E. Pg. 215, Lines 1 - 25

... market for 325 mesh magnetite?

A. Yes.

Q. Where?

A. Mostly Utah and then in Phoenix.

Q. Did you say they would have to pelletize that?

A. No, they use it for sink-float for cleaning coal and as long as they can slurry it and maintain the right density to float the coal and sink the rock, that is --and the price of it in Utah, they will pay \$50 a ton and the cost will be about \$25 a ton for freight from here to Utah.

Q. Do you know whether or not 325 mesh magnetite is available in Minnesota?

A. Yes. They have to pay \$50 there but their freight rate is \$40. so I could save them about \$15. Well, after bagging it I could save them \$10. by shipping from here to Utah.

Q. Do you know whether or not they are furnishing that material for heavy media market in Minnesota? I mean, the 325 mesh magnetite.

A. Yes, they are

Q. They are?

A. Yes.

Q. Are you aware that most of that stuff is pelletized and shipped for \$11 and \$12 a ton?

A. Yes.

Tr. Proc. H.E. Pg. 216, Lines 1 - 25

Q. You are aware of that?

A. Yes.

Q. Why do they do that when they could sell the 325 mesh magnetite for some \$50 a ton?

A. Because there is a limited market.

Q. There is a very limited market.

A. And they have to bag it and load it in a boxcar where big companies that got a half a billion dollars invested don't have time to fool around shipping one or two cars here and there.

Q. What is the extent of the market for 325 mesh magnetite for heavy media?

A. Oh, I think I could get markets for about four or five hundred tons.

Q. No, that wasn't my question. I said, what is the extent of the market, do you know?

A. The extent over what area?

Q. All over the United States.

A. They are starting to use for aggregate.

Q. And you believe if you had 325 mesh magnetite in sufficient quantities on section 19 you believe you could invade that market and secure a part of it?

A. I know I could.

Q. What's 325 mesh magnetite?

A. Well, that is really fine. I don't know what size, I
Tr. Proc. H.E. Pg. 217, Lines 1 - 25

... couldn't tell you.
Tr. Proc. H.E. Pg. 218, Line 1

Q. You are in total disagreement with Dr. Lacey. What about Luther Clemmer, here? You heard him testify too, did you not?

A. Yes, well, I agree with Mr. Clemmer pretty much except on the dredging where he brought up the 30 cent figure for bucket line wet suction. It can be worked on this type for about a third or a half.

Q. Tell me, Mr. Allen, don't you have any confidence or faith in an educated man who has gone through several colleges and has a PH.D.?

A. Well, it all depends on different things, circumstances.

Q. If you were going into mining operation you would rely solely on an amateur prospector; is that correct?

A. No, my self. The only money I ever lost on mining and went broke was I had two geologists okay the project and I went broke and that was on that mananese deal and I lost about a hundred thousand, so--

Q. I believe you stated you agree with Mr. Clemmer on everything but his costs on the dredging operation; is that right?

A. Yes.

Q. Did you hear his testify about the amount of minerals that is found in that material on Section 19?

A. Well, he had to take the facts. He only had a sample so
Tr. Proc. H.E. Pg. 220, Lines 2 - 25

... deep. He couldn't tell what was below that. He had to go on what he put the test on.

Q. Would you say he went to the wrong place to get his samples?

A. No. If he had gone three or four feet deeper--

Q. What if he went one foot away?

A. One foot the other way it might have been twice as good.

Q. Can you go any higher than twice as good?

A. Oh, maybe.

Q. He indicated that if he went twice as good it wouldn't be any good.

A. He indicated we would lose at that figure but if we could work it any cheaper we could do it at a profit.

Tr. Proc. H.E. Pg. 221, Lines 1 - 13

REDIRECT.

BY MRS. GIRARD:

Q. Mr. Allen, under cross examination you said that you had dug some holes while you were doing work on section 19?

A. Yes.

Q. How deep were your holes?

A. The deepest was five foot.

Q. Did you see any minerals on the sides of your holes?

A. Yes, there was places in the sand that we could-- that

Tr. Proc. H.E. Pg. 228, Lines 17 - 25

... we could see layers of minerals.

Q. Layers. Could you indicate with your fingers or estimate how thick the thickest of those veins may have been?

A. Oh, about the thickest was about a half inch.

Q. And what color was that vein?

A. Black.

Q. Did you test it with a magnet?

A. Yes.

Q. What did it show?

A. It shows predominately magnetite.

Tr. Proc. H.E. Pg. 229, Lines 1 - 10

Q. Do you think the discovery was such that it deserved further exploration?

A. Yes, I do.

Q. Would you deem yourself a reasonably prudent man?

A. Yes.

Q. Would you deem yourself a miner.

A. Yes, I would.

Q. Now then, in speaking of the use of magnetite as a heavy flotation system you said that there was a very limited market. Do you think that we could produce in quantities sufficient to supply that market?

A. Yes we could, I think so.

Q. Do you believe that it would be necessary for us to find numerous small markets?

A. Yes. I think we should explore any speciality use of it.

Tr. Proc. H.E. Pg. 230, Lines 4 - 19

BLAINE LORD, Witness

DIRECT EXAMINATION. BY MRS. GIRARD.

Q. Mr. Lord, do you know Mr. Allen?

A. Yes.

Q. When did you meet Mr. Allen, approximately?

A. Well, it's been a little less than a year ago.

Q. What is your occupation?

A. I am a well driller.

Q. How long have you been drilling wells?

A. About 20 years.

Q. Here in Arizona?

A. Yes.

Q. How long have you been in Arizona?

A. About 25 years.

Q. You are well aware then, of the water shortage?

A. Well, yes I'm aware of it.

Q. Are you familiar with the water laws of Arizona?

A. Yes, I believe so.

Q. Is there a well on section 19?

Tr. Proc. H.E. Pg. 234, Lines 8 - 25

A. Yes there is.

Q. Did you drill it?

A. I did.

Q. Could you tell us how far down you went?

A. 360 feet.

Tr. Proc. H.E. Pg. 235, Lines 1 - 5

Q. Are you familiar with how the water from that well will be used?

A. I believe so.

Q. That is for mining purposes?

A. Yes, that is right.

Q. Is there any way that the water might be conserved?

A. Oh, yes.

Q. Would you please tell us how?

A. Well, if we should use that for mining it could be used over and over after it was run over a mining table or however they used it, it would be put in a pool and when it is settled it would be repumped to use again.

Tr. Proc. H.E. Pg. 236, Lines 4 - 15.

Q. Now when you put down the well did you take samples?

A. Every five feet.

Q. How did you take your samples?

A. We had a big container there, about as big as a barrel, that we dumped our bailer in and we usually run the bailer three times each five feet..

Tr. Proc. H.E. Pg. 237, Lines 11 - 19

Q. Mr. Lord, have you ever been involved in any sort of prospecting or mineral work, mining work?

A. I have.

Q. Yes?

A. Yes, Well, about 1939 I did some mining for manganese-- well it was west of Wickenburg.

Q. What was your--what relation did you have to the mining that you were doing?

A. Well, it was kind of a small operation. We--I say we, because my brother and I were hauling this manganese to Phoenix for use in fertilizer-- we would go out and drill the holes and shoot this manganese. It was surface. We would load it and haul it to Phoenix.

Q. Did you do your own mining down there?

A. Yes. Thats right.

Q. Now then, are you familiar with the minerals that's supposed to be on section 19?

A. I believe I am.

Tr. Proc. H.E. Pg. 238, Lines 8 - 25

Q. You have seen samples of it?

A. Yes.

Q. Now then, when you took samples from the well did you examine them afterwards?

A. I did.

Q. Did you see any mineral?

A. Yes.

Tr. Proc. H.E. Pg. 239, Lines 1- 7

Q. Did you notice whether or not this black sand was in any particular layer?

Tr. Proc. H.E. Pg. 239, Lines 24-25

A. It was all the way down.

Q. Would you say in some places it was in better concentration than in others?

A. I would.

Tr. Proc. H.E. Pg. 240, Lines 1 - 4

Q. Knowing the little that you do about magnetite, in spite of that, did you think you saw enough there that would be reason for further exploration?

A. I do.

Tr. Proc. H.E. Pg. 240, Lines 16- 19

right?

A. Yes, that's right.

Q. If you pumped at the rate of 400 gallons a minute, how soon would you reach the bottom of the well.

A. I don't believe you would ever reach it.

Q. You believe there is plenty of water in that area and you would never reach the bottom?

A. I do.

Q. Hasn't the water table gone down in that area?

A. It probably has gone down a little bit.

Q. What do you mean by "a little bit"?

A. Five or 10 feet in 20 years.

Q. What about seven feet in 10 years?

A. It could be in a variable year the same as your rainfall.

EMOJEAN GIRARD, Witness:

DIRECT EXAMINATION

THE WITNESS:

I have a lease on section 19, a mining lease. I am a partner in the Glenn Allen Mining Company that hopes to mine it.

On or about the middle of last month, my husband who is Tr. Proc. H.E. Pg. 250, Lines 22 - 25

a chemist who works in an assay office, locally, and I went out to Section 19 to take samples of the ore that we found there. We tried to be quite systematic about it, to be as fair to the Land Office as we could be. We, in fact, went overboard and rather instead of salting it, we diminished it. Our procedure was to start on a --let me think of the direction--the northerⁿhalf of the section. We started at the northeast corner and proceeded from there diagonally, to what we thought was the middle of the section. From there

Q. What kind of a glass?

A. Well, about a 10-power hand glass that the prospectors use.

Q. Now you stated something about black sand being in

Tr. Proc. H.E. Pg. 243, Lines 1 - 25

...better concentration in certain spots as you were digging the well. Was that your testimony?

A. Yes.

Q. What do you mean by "better concentration"?

A. What I meant by that was there was samples each five feet and some of the samples were a little stronger than the others.

Q. What do you mean "stronger"?

A. More black. When I'd pan it in the pan there would be more black sand in the sample.

Q. I believe you stated that there was a 10-inch casing in the well; is that correct?

A. That is correct.

Q. Is that a 10-inch casing capable of pumping 400 gallons a minute out of that well?

A. The 10-inch casing would be capable of pumping a thousand gallons a minute, but the well I would recommend to pump about 400 gallons a minute from the sands that we hit in the water.

Q. It is pumping now about 28 gallons a minute, isn't it?

A. Thats right.

Q. What would the draw down be if you pumped 400 gallons a minute?

A. About 30 feet.

Q. And how far could you expect to go if you were lowering the draw down 30 feet a minute?

Tr. Proc. H.E. Pg. 244, Lines 1 - 25

A. I don't quite understand you.

Q. I asked what would the draw down be if you pumped 400 gallons a minute and I thought you said 30 feet. Is that

BLAINE LORD Witness

Cross Examination BY MR. AHO:

Q. Let's get your mining experience. I believe you stated your sole experience was in connection with this manganese.....

Tr. Proc. H.E. Pg. 240, Lines 23- 25
... out of Wickenburg; is that correct?

A. No Sir.

Q. Where?

A. No, Sir.

Q. What other mining experience do you have?

A. I have mined in the Silver Bell area for copper and a little bit of gold and lead.

Q. You say you mined for copper. What do you mean you mined for copper.

A. Well, what anybody does when you mine for copper. I dug it out of the ground.

Q. Did you work for a mining company?

A. No. It was all on my own.

Q. Did you locate any copper deposits.

A. We did.

Q. Did you sell it?

A. We sold some and did rather well when we first started. It ran about \$20 a ton at that time.

Tr. Proc. H.E. Pg. 241, Lines 1 - 18

Q. Now you stated you saw some mineral when you were digging this well on section 19. What minerals did you see?

A. Well, I saw the black minerals that was in the sand and--

Q. What black minerals?

A. Magnetite and --

Q. How did you identify the magnetite?

A. Well I panned out quite a bit of the black, what you would get in a pan when you panned the dirt out, and you would

find black minerals. Then a magnet would pick up most of it.

Q. Did you use a magnet?

A. I did.

Q. What other minerals did you see other than magnetite?

A. I didn't identify any other minerals.

Q. How did you know there were black minerals other than magnetite if you didn't identify them?

A. By that I mean the garnets. The magnet didn't pick them up.

Tr. Proc. H.E. Pg. 242, Lines 7- 25.

Q. How did you recognize the garnets?

A. Well, just by the use of my eyes with a glass.

Q. What size were they?

A. Well, they would be probably from about a 10 mesh down. They would vary in size. Some of them was rather small and up to-- I'd say about up to --about 10 mesh.

Q. Were they circular or angular?

A. Well, I didn't go that far to examine them that far. I didn't have a strong enough glass.

Q. As a matter of fact, all you were out there for was to dig the well, was it not?

A. Primarily, yes.

Q. You paid no particular attention to what minerals were or were not in the ground?

A. I did pay attention, particular attention, because I was interested in them.

Q. The black sand?

A. The black sand and the garnets or anything else I would have found. I look for anything I can find.

Q. Just with the naked eye?

A. With the naked eye and with the glass.

We proceeded in a northwesterly direction, diagonally, until we reached what we thought was the furthermost corner of the section. By taking huge steps my husband stepped off what he thought to be a hundred yards. At each hundred yard point we took a sample of the dirt by scooping it up in a shovel. First of all, we dug around three feet in diameter. We tried to mix the dirt up and then we took a shovelful and put it in a bag. Now, we used one bag for all the samples going in one direction that we took, so we took two composite bags of soil on that one-half of the section.

On the souther half of the section we started up the primary river bed, which the contestant has testified is there. We went 300 feet and every 300 feet we started and we took a line of samples in the same manner as we had taken them on the soild on the other side. These also were.....

Tr. Proc. H.E. Pg. 251, Lines 1 - 25.

... put into one bag until we covered what we thought would be the one-half of the claim. We started the same procedure on the other claim so we had two composite samples of river bed sand. We took these home. My husband has a Jones Splitter which he used to reduce it, the size of the sample that we took. Then he took the sample and he ground it. He had trouble grinding it due to the fact that the grinders got clogged up on the garnet that was in there.

We took the sample that we had, the ground samples, and put them into small bags. He rolled the sample. He took a small part of it and he sent it off to Smith- Emery, a survey company in California, for a spectrographic analysis. We were after various ores. We could not afford to have separate tests made for each and every ore we were after, so we sent off for the composite with a spectrographic analysis. I would like to offer this for identification, please.

(the papers referred to were marked Contestee's Exhibit D,E,F,G,H,I, and J for idnetification)

THE WITNESS: For purposes of identification, I would like to say that we packaged the samples into one box. I addressed it, dated it, attached to it a letter to Smith-Emery, attached the ores and sent it off.

Tr. Proc. H.E. Pg. 252, Lines 1 - 25

In response thereto, I received back these reports from Smith-Emery.

Now, reports, naturally, because it was a spectrographic analysis, the reports do not show the properties of the major constituents nor does it show the quantity of the intermediate constituents, but it does show the certain other elements in the sample, primarily among them was titanium which was .5 per cent; manganese at ,1 per cent and vanadium showed at .005 per cent.

Now, .005 per cent is small in vanadium. If I may, in accordance with the encyclopedia--in accordance with the government Bureau of Mines Bulletin 556--I'd better get the issue here--the issue of 1956, on page 955, "Most titanium ferrous magnetite deposits contain vanadium from .1 to .5 percent."

They say that usually the grade is low, but it can be mined as a by-product. They usually say that from this ore they can concentrate it to .7 . Well, we did better than that. My husband took an ordinary sample, part of the one, of the ones he had taken from the river bed, and with the magnet he extracted the black ore. He sent off a sample of this black ore along with the other samples that were sent to Smith-Emery as sample No. 4. That sample showed a concentration of canadium to 1 per cent. Now, then, our job was not finished. We merely

Tr. Proc. H.E. Pg. 253, Lines 1 -25

showed the existence of some rather valuable mineral. Next, we tried to determine what method we might extract this mineral by. We had very limited facilities and we are not mining experts, so we did the best we could. My husband took a sample. He ground it down quite fine. He ground it in one of these little ceramic things with a-- I don't know. At any rate, he then took a magnet and separated out the rest of the magnetite. He determined that there was some substances which were very magnetic; others which were only partially magnetic and still others which were not magnetic at all. The magnetic and slightly magnetic were a very dark hue, looked black, and we assumed that most of the magnetic was magnetite. The nonmagnetic also had a metallic hue. It had a dark brown hue with a cast to it.

We were short on time again and funds, also. So we sent this off to Arizona Testing Laboratories, also to be given a spectrographic analysis to determine which ores we had extracted in which of the various concentrates. We did not send off the concentrate of magnetite because in our number four test we had already determined that somewhat. We sent off what is the slightly magnetic and the non-magnetic. They were marked respectively Nos. 5 and 6. Both of them showed that they were concentrating titanium in

Tr. Proc. H.E. Pg. 254, Lines 1 - 25

...over two per cent. Zirconium was in 2 per cent of both of them and that was the things of primary interest.

It showed that the vanadium was again five-thousandths of a percent which would indicate to us that we weren't concentrating it by the method we used but we did want to show that we had been trying very sincerely to find out how these ores might be separated.

I would like to submit this for your examination.

MR. AHO: This is the original here. Is this the one you want? You are going to let me see a copy, I presume?

THE WITNESS: Yes. Now, we realized the defects in our method did not give us a quantitative analysis. A subsequent witness will reveal the amount of magnetite that we can concentrate by a very simple method.

Tr. Proc. H.E. Pg. 255, Lines 1 - 15

JAMES CONCANNON, Witness

Direct examination

BY MRS. GIRARD:

Q. Mr. Concannon, what is your business?

A. I am engaged in the mining business.

Q. What sort of mining business?

A. Well, specifically, the extraction of minerals. The separation of minerals without the use of water.

Q. Could you describe your process to us?

A. Well, it is a gravity process. We use air circulating media to separate the heavy minerals from the lighter minerals.

Q. Is it similar to any other mining device that you know of that could give us some idea?

Tr. Proc. H.E. Pg. 265, Lines 11 - 25

A. Oh, there have been countless devices developed over a period of many many years. It is essentially the same in many respects. It is a shaking table except that we use air as a circulating medium rather than water.

Tr. Proc. H.E. Pg. 266, Lines 1 - 6

Q. Did they bring anything with them?

A. Yes, they brought in some material, some sand, alluvial sands and--

Q. Did you help them unload the sands?

A. Yes.

Q. What did you do with them after they were unloaded?

A. We screened them. We classified it into five sizes.

Q. What mesh screen did you use?

A. The coarsest screen was a 20 mesh screen. We classed into five sizes; minus 20, plus 40, minus 40, plus 60, minus 80, plus 100, minus 100.

Q. Now then, you weighed the ore at some time. When did you weigh the feed?

A. We weighed the ore after we had screened it.

Q. Did you weigh both the waste and the regular substance?

A. Yes. We had a total of approximately--well, something over four hundred pounds.

Q. And now, after you screened it and weighed it

Tr. Proc. H.E. Pg. 267, Lines 8 - 25

... what did you do next?

A. Then we passed each size individually over the table.

Q. Each size from the screening?

A. Yes.

Q. After it was ran over, what did you do with the component parts?

A. We took the concentrates from each size. We ran each size separately and then we took the concentrates and weighed those.

Q. When you weighed them, what did you find?

A. Well, we found that approximately twenty-five per cent of the material which was brought in was represented in the black sands. I mean--oh, twenty five percent.

Q. Twenty Five per cent, you say?

A. Twenty -five per cent, yes.

Tr. Proc. H.E. Pg. 268, Lines 1 - 15.

Q. Could you recognize the material which you ran?

A. Well, I would say that I could recognize --I mean there are a great --

Q. I understand the difficulty. Nevertheless, would you look in these boxes, please, and see if it is the same things that re here?

MR. AHO: What are you going to do, offer the bags as a sample of the material in the boxes?

MRS. GIRARD: I will offer the boxes. I will have to testify myself that these came out of the boxes.

Q. Now does that look like approximately the quanity that you got off the table?

A. Yes.

MRS. GIRARD: Then, may I admit those into evidence please, or have them marked for identification?

(The boxes referred to were marked Contestee's Exhibits L,M,N,O,P, for identification.)

HEARING EXAMINER STEINER: Contestee's L through P have been offered. Is there any objection?

Mr. Aho: Is that the five boxes?

HEARING EXAMINER STEINER: Yes, Sir;

Tr. Proc. H.E. Pg. 269, Lines 4 - 25

MR. AHO: Let her put her statement in the record that that material came from the claim.

MRS. GIRARD: Counsel for the Contestees will state that if Mr. Allen were called to testify he would state that those boxes contain material that was run over Mr. Concannon's table.

MR. AHO: Containing material? I want that stated that that contains minerals in those boxes. I have no objection to the five boxes.

Tr. Proc. H.E. Pg. 270, Lines 1 - 9

Q. How long have you been in the mining business, Mr. Concannon?

A. Five years.

Q. And you have had quite a wide contact with mining men?

A. Yes.

Q. Are you familiar with the percentages of ore that are customarily mined at a profit?

A. Well --

MR. AHO: I am going to object unless there is further qualification. Mere contact with mining men does not qualify the witness to answer the question.

By Mrs. Girard; All right. Do you know of any mine that had a low mineral percentage and still was mined at a profit.

A. I think that most of the mines, particularly in this area, in fact, throughout the United States, can be considered low grade ores.

Tr. Proc. H.E. Pg. 272, Lines 1 - 18

Q. Mr. Concannon, returning again to the samples which you ran. Did you say the concentrate was from what was brought in?

A. Well, the percentage of black sands in relation to the amount of material, the lead material, which was brought in was approximately twenty-five per cent.

Tr. Proc. H.E. Pg. 273, Lines 15 - 20

CROSS EXAMINATION

By Mr. Aho;

Q. I think you have referred to high grade black material, is that correct?

Tr. Proc. H.E. Pg. 273, Lines 22-25

A. Yes Sir.

Q. High in what?

A. High in blackness. In blackness, yes.

Q. You don't know high in what minerals?

A. Yes. I would say high in magnetite.

Tr. Proc. H.E. Pg. 274, Lines 1 - 5

(Pertinent Findings from DECISION, of August 24, 1960
by Hearing Examiner Rudolph M. Steiner)

¶ ¶ ¶ X Nor does the fact that Glenn Allen located thousands of acres under the mining laws establish that these particular claims were not located in good faith. There is no evidence of any actual consequential use of the subject lands for purposes other than mining. It is concluded that the said allegation has not been sustained. Contestant's allegation number 3 is dismissed.

Minerals have been shown to be present in the alluvium exposed on the subject claims. The only question to be determined is whether or not those minerals, the most important of which is magnetite, are present in such quantity as to warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine.

The contestant's very well qualified expert witnesses conducted reasonable quantitative tests of samples taken from the claims and estimated the costs of recovery of the minerals by conventional methods. The results of these quantitative analyses show that the theoretical value of the recoverable minerals present is far exceeded by the costs of the recovery and marketing thereof. x x x x (DECISION, H. E., par. III, pg. 6; pg. 7)

RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

	<u>Date Filed</u>
Complaint for Declaratory Judgment	April 16, 1963
Exhibit "A"	April 16, 1963
Motion for Summary Judgment	July 1, 1963
Statement by Defendants...In Support of Motion Summary Judgment	July 1, 1963
Notice of Taking Deposition of A. G. Jurko . . .	July 15, 1963
Joint Motion of Defendants Helmandollar, Udall, and A. G. Jurko, for Order Staying the Taking of Deposition of A. G. Jurko	July 19, 1963
Opposition to Joint Motion of Defendants for Stay of Taking Deposition of A. G. Jurko . . .	July 31, 1963
Order Staying Taking of Deposition of A. G. Jurko until a date after October 20, 1963 to be noticed pursuant to Federal Rules of Civil Procedure	August 6, 1963
Notice of Cross-Motion of Plaintiffs for Summary Judgment	August 27, 1963
Opposition of Plaintiffs for Summary Judgment . .	September 3, 1963
Statement of Plaintiffs in Support of Opposition to Defendants' Motion for Summary Judgment	September 3, 1963
Affidavits: Blaine J. Lord, Glen Allen, and Joanne Neufang, in Support to Opposition to Motion for Summary Judgment	September 3, 1963
Affidavit of Plaintiff Blaine J. Lord in Support of Opposition to Motion for Summary Judgment	September 10, 1963

RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

	<u>Date Filed</u>
Proceedings of September 11, 1963, of Hearing of Defendants Helmandollar and Udall Motion for Summary Judgment... Submitted	September 11, 1963
Order dismissing cause as to Defendant A. G. Jurko	September 16, 1963
Judgment	September 30, 1963
Motion of Plaintiffs for Order to Vacate and Re-enter Judgment or Order	February 4, 1964
Affidavit of Jose del Castillo in Support of Motion for Order to Vacate and Re-enter Judgment or Order.	February 4, 1964
Affidavit of Cornelio O. Lopez, in Support of Motion for Order to Vacate and Re-enter Judgment or Order.	February 4, 1964
Opposition of Defendants to Plaintiffs' Motion for Order to Vacate and Re-enter Judgment or Order.	February 7, 1964
Order granting Plaintiffs' Motion for Order to Vacate and Re-enter Judgment of 9/30/63	February 18, 1964
Notice of Appeal by Plaintiffs	March 9, 1964
Motion by Plaintiffs to fix different amount of Appeal Bond or to dispense with it and for an Order that Notice of Appeal Operate as Bond on Appeal	March 9, 1964
Order Granting Motion of Plaintiffs that the Notice of Appeal Operate as Bond on Appeal	March 23, 1964
Designation of Record and Statement of Points . . .	March 30, 1964

RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Date Filed

Notice of Appeal by Defendants Helmandollar,
Bureau of Land Management and Udall April 17, 1964

Statement of Points - of Defendants -

Stipulation as to Supplemental Record May 22, 1964

Order, United States Court of Appeal July 2, 1964

PLB-WMB-AP 7
3-30-65
(3)

OPENING BRIEF OF APPELLANT'S, No. 18,625

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

BLAINE J. LORD
EDYTHE M. KERBER, et al,

Appellants, Case No. 18,625
Cross Appellees

vs.

Case No. 18,680

ROY T. HELMANDOLLAR, etc.
BUREAU OF LAND MANAGEMENT
SECRETARY OF THE INTERIOR,
STEWART L. UDALL,

Appellees,
Cross Appellants

818

APPEAL FROM JUDGEMENT OR ORDER GRANTING
MOTION FOR SUMMARY JUDGEMENT

CROSS APPEAL FROM ORDER OF COURT TO VACATE
JUDGEMENT AND TO RE-ENTER JUDGEMENT

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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 13 1964

Nathan J. Paulson
CLERK

STATEMENT OF QUESTION PRESENTED

1

Whether the administrative decision, upheld by the Lower Court, that minerals found in the subject lands, comprising four mining claims, most important of which is magnetite, are not present in such quantity as to warrant a prudent man in spending his time and money in an effort to develop a mine, is supported by substantial evidence, where such decision relies in its determination upon the estimate of value of the minerals present, given by a government witness who claims that mining operation on the claims would result in a loss of over \$400,000 per acre, based upon samples taken by him solely from dumpings out of well dug at one spot on one of the claims, which samples, according to another government star witness, represented mineralization of the immediate vicinity of area, and which type of samples, according to the government's own evidence, if taken from one location only "means very little" and that "to truly evaluate a piece of ground for heavy minerals, a number of one-cubic foot samples should be examined"; where other government analyses and estimates, based upon methodical sampling, established values of low-grade mineral deposits in a region of paying low-grade mining.

2

Whether the mining laws, in the case of valuable minerals, as distinguished from common sands and gravel, require that the values of minerals present in a mining claim must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about?

The determination of the above question is to be made in the light of the following facts, established by findings of the administrative agency's hearing examiner, and which are no longer disputed:

- (a) That there is no evidence of any actual consequential use of the subject lands for purposes other than mining.
- (b) That these particular mining claims were not located other than in good faith.
- (c) That minerals have been shown to be present in the alluvium examined within subject claims.

3

Whether appellant miners were denied fair and impartial hearing on the contest and given full opportunity to present their defenses, where, 3 months after filing location notices, administrative agency filed contest charging lack of discovery of valuable minerals within claim, set hearing day 3 months thereafter, denied duly made motions for continuance on grounds of difficulties in preparation of case within so short time given, while all the time Congressman Stewart L. Udall, member of House Committee on Interior and Insular Affairs, was interested professionally and acting for client who wanted to have the land, and, while miners' case was pending on appeal to Secretary of the Interior, said Hon. Udall was and is himself the Secretary and head of the administrative department, and motion by miners, supported by affidavits, to present additional evidence to show marketability of minerals and cost of extraction thereof is much less than Contestant claimed, was denied on ground that granting it would require reopening of hearing, ---

and therefore repugnant to due process clause of Constitution.

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OPENING BRIEF OF APPELLANT'S, No. 18,625

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

BLAINE J. LORD	!	
EDYTHE M. KERBER, et al,	!	
Appellants,	!	Case No. 18,625
Cross Appellees	!	
vs.	!	
	!	Case No. 18,680
ROY T. HELMANDOLLAR, etc.	!	
BUREAU OF LAND MANAGEMENT	!	
SECRETARY OF THE INTERIOR,	!	
STEWART L. UDALL,	!	
Appellees,	!	
Cross Appellants	!	

APPEAL FROM JUDGEMENT OR ORDER GRANTING
MOTION FOR SUMMARY JUDGEMENTCROSS APPEAL FROM ORDER OF COURT TO VACATE
JUDGEMENT AND TO RE-ENTER JUDGEMENT

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STATUTES, REGULATIONS AND RULES INVOLVED

Statutes

". . . All valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States., R.S. sec. 2319; Feb. 25, 1920, c 85, Sec. 1 41 Stat. 437; 30 USCA. sec.. 22.

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, . . . but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. . . "R.S. secs. 2329,2331; March 3,1891, c.561, sec. 4,26 Strat. 1097; USCA, Tit. 30, sec. 35.

CONSTITUTION OF THE UNITED STATES

"No person shall . . . be deprived of life, liberty, or property without due process of law;" Fifth Amendment.

CODE OF FEDERAL REGULATIONS

"Postponments of hearings will not be allowed upon the request of any party of the Bureau except upon the showing of good cause and proper diligence. A request for a postponement must be served upon all parties to the proceeding and filed in the office of the Examiner at least 10 days prior to the date of the hearing. . . .

(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witness, it must state what the substance of the testimony of the absent witness would be. No Postponment will be granted if the adverse party or parties file with the Examiner within 5 days after the service of the request a statement admitting that the witnesses on account of

JURISDICTIONAL STATEMENT

The venue and jurisdiction of the United States District Court, for the District of Columbia, is founded upon the provisions of Section 10 (b), 60 Stat. 237, 5 U.S.C.A. 1009.

The official residence of the Secretary of the Interior, Stewart L. Udall, is Washington, D.C. Suit against head of federal agency, proper venue is laid in district of his official residence where he performs official duties. (Clement Martin Inc. v. Dick Corp., 57 F Supp. 961) (JA 2).

Decision of the Secretary of the Interior, on administrative appeal, was entered June 22, 1962. No appeal will lie in the Department of the Interior from the Decision. (43 CFR 221.37) (JA 2,3).

The Bureau of Land Management and the Interior Department of the United States constitute "agency" within subsection (a) of section 1009, 5 U.S.C.A. (Adams v. Witner, 271 F2d 29) (JA 3).

As to plaintiffs, the amount in controversy exceeds exclusive of interest and costs, the sum and value of Ten Thousand Dollars (\$10,000.00) (JA 3).

The jurisdiction of this court is based on the act of Congress as amended October 31, 1951 G655, Sec. 48, 65 Stat. 726, July 7, 1958, Pub. L. 85-508, Sec. 12 (e), 72 Stat. 348; 28 USC 1291, which provides in pertinent part as follows; "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the SUPREME COURT."

STATUTES, REGULATIONS AND RULES INVOLVED

Statutes

". . . All valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States., R.S. sec. 2319; Feb. 25, 1920, c 85, Sec. 1 41 Stat. 437; 30 USCA. sec.. 22.

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(b) The request for a postponement must state in detail the reasons why a postponement is necessary. If a request is based upon the absence of witness, it must state what the substance of the testimony of the absent witness would be. No Postponment will be granted if the adverse party or parties file with the Examiner within 5 days after the service of the request a statement admitting that the witnesses on account of

whose absence the postponement is desired, would, if present, testify as stated in the request. If time does not permit the filing of such statement prior to the hearing, it may be made orally at the hearing." Circ. 1950, 21 F.R. 1860, March 27, 1956, as amended, Circ. 1962, 21 F.R. 7623, October 4, 1956; CRF Tit. 43, Sec. 221.71

STATEMENT OF THE CASE

In this brief, the Appellants are the appellants in case No. 18,625 and the Appellees are appellees in the same case. The appellees have cross appealed, and for the convenience of the court, they are referred to in this brief as "administrative agency", the Government, or "contesting"; and the Appellants are referred to as "miners", mining claimants, or "contestees".

In the court below, the mining claimants filed an action against the appellees (and three individual interveners), seeking a review of the administrative agency's decision, on a government contest, declaring null and void four placer mining claims filed on the public lands of the United States, covering section 19, Township 12 South, Range 13 East, Salt River & Gila Meridian, in Pima County, Arizona, (JA 4). Two of the interveners at the contest hearing made no appearance in the action in the court below, and Andrew G. Jurko, one of the defendants below, appeared represented by counsel. He died before the hearing in the court below, and the case against him was dismissed on agreement between counsel (JA 74, 58-59), leaving the government appellees herein the sole party defendants.

The government made no answer to the complaint, and filed a motion for summary judgment, submitting the record of the Department of the Interior consisting of file No. Arizona 10379, based on the decision of the administrative agency and on the pleadings on file, (JA 33, 34, 35) accompanied by a statement. The government claimed there was no issue of fact and prayed for judgment as a matter of law. Except for an affidavit submitting the administrative record, the government filed no other affidavit. (JA 36)

Appellants opposed the motion for summary judgment and filed a statement in support thereof, (JA 43, 45), and a notice for a cross-motion

for summary judgment, (JA 42). Among other grounds, appellant's opposition claimed that on the established facts, the principles of substantive law warrant summary judgment in plaintiff's favor.

The government relied on the theory that the administrative decision, holding that minerals discovered by the mining claimants in the subject claims, most important of which is magnetite, are not present in such quantity as to warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine, is supported by substantial evidence. (JA 59,60; Decision August 24,1960 by Hearing Examiner).

The evidence, in the record, on which the government motion relied, consisted of quantitative tests of samples taken from the claims by the agency's witnesses. These tests and quantitative analyses were mainly presented by two sets of government witnesses; (a) Dr. Willard Lacey, who took samples by himself from only one spot at the dumpings out of a well drilled on one of the four claims, from the sides of about 15 shallow holes of a shovel, and came away with a total of 2-1/2 pounds of the dirt material, (JA 117,119,120), which he took to a Wilfley table and made a "rough concentrate", separated the heavy magnetic fraction containing magnetite and counted them (JA 118). He considered that it was the magnetite mineral only of which he could figure any value out of his 2-1/2 pound sample. (JA 119). Figuring on the magnetite he extracted, in his own fashion, he came out with an estimate that mining operations on the four claims covering the section of land would result in a net loss of \$406,000 per acre. (JA 119A).

The governments' exhibit 27, on the last page, states that if material submitted, represents material taken from one location only, it means very little, and that to truly evaluate a piece of ground for

heavy minerals a number of one-cubic foot samples should be examined. (JA 114). Government's principal witness, Luther S. Clemmer, testified that sample of material from the well drill hole is evidence of the material of that immediate area. (JA 115)

The other set of witnesses for the government consists of (b) Luther S. Clemmer, accompanied by Henry O. Ash, who took samples from about the center of each of the four claims, digging with a shovel in the top soil between 15 to 18 inches deep. One from a point in the wash, and a composite of samples from the dumpings out of the well; bagged and labelled each. (JA 101). They processed these samples methodically and made detail record of the steps of processing and making the concentrates. (JA 103-111). He demonstrated in his exhibit 28 that they could make higher concentrate, if the material is concentrated down far enough. (JA 109). He obtained values of iron, with small variations, and stated that in two samples he got 20.8 cents theoretical value for iron in two samples, which are approximate to Dr. Lacey's estimated value for magnetite of 20 cents per yard. (JA 106, 119A). He assayed for minerals that showed value, including gold and silver, zircon, titanium and garnet, and he came up with a total for the minerals of value, outside of the gold and silver he assayed, a theoretical value of 59.28 per cubic yard. (JA 110).

According to him, the land in question is mineralized with what he called "black sands", which may be dark or red of heavy minerals of specific gravities from three to five, and which appear in the washes (river beds). (JA 96, 97) The contestee's witness, Glen Allen, who located these claims, had dug pits, the depth to about 5 feet and had exposed layers of this black sands deposits and they were about half an inch thick. (JA 142). These pits Mr. Clemmer saw on another

visit to the claims in December, 1959, down the large wash and across the south half of the section in question and saw also large cleared areas, and small pits and tire tracks about ever 100 yards going west for about half a mile, where it appeared small amounts of material had been removed. (JA 99,100). Dr. Lacey walked over the section in question, a good deal, a week prior to the hearing before the Hearing Examiner on March 16, 1960. (JA 117).

Mr. Allen on cross-examination stated there was nothing he could agree with in Dr. Lacey's testimony. He agreed " pretty much" with the testimony of Mr. Clemmer. (JA 137,141). He stated that the amount of minerals Mr. Clemmer found was what the samples he had taken contained but could not tell what minerals below that. (JA 141).

Mr. Allen testified that he had filed about a thousand placer claims for himself and other people, the largest deposits is located in Pinal County north of Owlhead, (Arizona), where several companies are involved and had one hundred fifty sections filed on, containing mostly magnetite, the same as section 19 in question. (JA 124, 125). He had discovered these magnetite minerals in section 19, also garnet, and on subsequent tests made, revealed other minerals, besides vanadium, titanium, zircon and in mining the claims, he would start to high-grade the washes. He stated he had enough confidence in knowing himself that there was enough magnetite in the subject land to mine at a profit. (JA 127).

Mr. Clemmer stated that based on an experience he had with an employer in Illinois, it cost by floatation dredge, 30 cents to recover minerals from the ore material, and also upon J.R.Simplot Company's experience. (Tr. Proc., H. E. P.70, Lines 2 - 11).

Mr. Allen differed just on this point with Mr. Clemmer. He stated that for bucket line suction on that type of dredging it could be worked for "about a third or a half". (JA 141). He made inquiry and obtained an estimate from Thurman and Wright for suction dredging cost of ten to fifteen cents per yard and a prototype dry operation used by Base Metals in Nevada, with a capacity of a hundred yards an hour, at a cost of twenty three to twenty five cents a yard. (JA 128,129,130). He testified to other type machine for dry placer mining, about which the President of Base Metal Production in Las Vegas, Nevada has estimated the operating cost of \$0.23 to \$0.25 and has a recovery capacity of the gold in the feed from 75% to 85%. (JA 129); also of another new type machine by Herb Brockley, Fremont, Ohio, which is at the Chapman Dyer Co. in Tucson, Arizona, running tests and will concentrate dry or wet. Machine could be built in a commercial size to separate at a cost of twenty to twenty five cents a yard. (JA 130,131). Mr. Allen was relying on his experience as a practical miner and his knowledge of mining in Arizona, besides upon his personal knowledge of dredging with quite a few dredging in the United States and upon an experience with dredging in New Mexico. (JA 127, 137).

Government witness Mr. Clemmer stated that not only he had no dredging experience in Arizona, but also he did not have any mining experience in Arizona placer mining. However, he has heard or knew that in Arizona, copper ore as low as .3 to .5 per cent is being mined and that 20 years ago they were mining only the higher grades. He agreed that new machinery was being developed every day which expedites the mining of small quantities of ore at a profit, and that more and better machines are being developed all the time. (JA 116). All witnesses agree and there is no dispute that there is a well on the land in question dug

by the contestees and have been using it in mining with sufficient water to justify a wet separation process. (JA 135). The man who drilled the well, Blaine J. Lord, a well driller by trade for 20 years in Arizona, testified that he dug the well in section 19, went down to 360 feet, with a 10 inch casing capable of pumping 400 gallons a minute, and a draw down about 30 feet/ (JA 143,144,147). He stated that if the water is used for mining, it could be used over and over after it was run over a mining table, or however it is used, it would be put in a pool and when it is settled it would be repumped to use again. (JA 144).

The complaint for declaratory judgment alleged in paragraph 36 that "The amended location claims in question were filed on August 31, 1959". On October 6, 1959, Mr. Luther S. Clemmer, Evaluation Engineer of the Bureau of Land Management, accompanied by Andrew G. Jurko, who had been in communication with the Land Management and with Hon. Stewart L. Udall, examined the subject lands. (Trans. p.29). In a letter dated October 8, 1959, addressed to Glen Allen, United States Congressman Stewart L. Udall, acting for his client Andrew G. Jurko, protested against the filing of the mining claims on the subject lands and warned that he shall have the law observed. At the time, and thereafter until January 21, 1961, Hon. Stewart L. Udall was a member of the House Committee on Interior and Insular Affairs. His client, Andrew G. Jurko, at all times mentioned herein claimed he "owns" the subject land of the mining claims in question and continued to do so, and on April 7, 1963, threatened plaintiff's workmen with trespass and threatened to seize the equipment and improvements belonging to plaintiffs. Thereafter said letter, dated October 8, 1959, (Exhibit "A"), Hon. Stewart L. Udall, actively urged on some action against the subject claims and toward their nullification.

On December 15, 1959, the contestant filed a contest in the Bureau of Land Management at Phoenix, Arizona. On January 27, 1960, the Hearing Examiner of said bureau set a hearing for March 16, 1960. Since the beginning of the year 1960, Hon. Stewart L. Udall was actively campaigning in the State of Arizona and at political rallies or group meetings spoke against the subject mining claims and of what he was going to have done with them. The Hearing Examiner as is the appeals officer is a subordinate officer in the Department of the Interior, which is under the jurisdiction and the concern of the House of Representative committee on Interior and Insular Affairs. At the hearing on said contest on March 16, 1960, Andrew G. Jurko intervened. Contestees objected and opposed his intervention on the ground that his grazing lease had long expired and had no legal interest in the subject land. It was claimed by him that some of his old fence was on said land. In the decision by the appeals officer in the Department of the Interior, it was stated that the locations conflicted in part or in whole with certain application on file but also with "a grazing lease of Mr. Jurko". (Decision, Director, P.1). Said Decision was rendered February 17, 1961. One month before, on January 21, 1961, Hon. Stewart L. Udall was sworn in as secretary of the Interior. The Secretary of the Interior is the head of the Department of the Interior. (R.S. Sec. 437, 5 U.S.C. 481). Under the statute the Secretary is charged with the supervision of public business relating to the following; 'the public lands, including mines and the Bureau of Land Management and Bureau of Mines (as amended June 17, 1957). When the contestees had to appeal to the Secretary of the Interior in accordance with 43 CFR, Part 221, as amended, as stated in the decision of the appeals officer, and to the time the Decision of the Secretary of the Interior on June 22, 1962, Hon Stewart L. Udall was the Secretary

of the Interior, the head of the Department of the Interior, and the superior officer. Secretary Stewart L. Udall, as individual, at all times mentioned herein, has a direct and pecuniary interest in the outcome of the contest against the subject mining claims, and his actions and utterances in the press and at public appearances has been adverse to the said mining claimants. For these reasons and circumstances, the said hearing and the appellate proceedings were not fair and impartial From the inception of the administrative contest proceedings to its termination, contestee plaintiffs have been denied, and did not have a fair and impartial hearing, and denied the due process of law, in violation of the Fifth Amendment to the Constitution of the United States. Plaintiffs have been deprived of their property rights and of their substantial rights for which they have no adequate legal remedy (JA 26,27,28,29).

More than ten days prior to the scheduled hearing before the Hearing Examiner, the complaint alleged in paragraph 14, contestees filed with the office of the Hearing Examiner a request for postponement of the hearing, . . . on the grounds that, diligence made and pursued, contestees were hampered and prevented by various circumstances from obtaining and compiling the necessary evidence in the defense of their case, and that their material witness, William Hazel, was ill with asthma in North Carolina and could not attend the day of the hearing. The testimony of said witness would tend to show negotiations with prospective mining developers toward the development of the mining claims in question, which testimony would have substantially supported their case. Such request for postponement of the hearing, contestees stated was not for the purpose of delay and that unless postponed for the reasons asserted would work great hardship and result in grave injustice to the said contestees. (JA 10)

It has been further alleged in said paragraph 14, that "the

contestant objected to the postponement on the grounds that the existence of minerals and its marketability should have been made and established upon the locating of the claims, and that the illness alleged of witness was of common nature and no medical certificate offered, and because the United States had, . . . "expended considerable time and monies in preparing for the hearing". . .

Neither the contestant nor the intervenor State of Arizona made or filed a statement ^{/in} with five (5) days after service of the request for postponement admitting that the witness on account of whose absence the postponement was desired would, if present testify as stated in the request. (JA 10, 11).

The Hearing Examiner denied the request for postponement, and the contestants alleged that such action is arbitrary and unreasonable, and that contestant's assertion that the marketability of the minerals should have been established upon location of the claims is not within the meaning of the mining laws, and would further, in order to present their defense, entail assembling of such evidence at such a short notice. (JA 11). Contestees further alleged that such denial for continuation of hearing "could manifestly be inspired by the intervention in the case by the client of the defendant Secretary of the Interior, Stewart L. Udall, since postponing the date of hearing would not have prejudiced the contestants and intervenors, and since contestant had not shown facts or circumstances warranting the rushing contestants to a hearing at such an early date and in an inopportune time (Ja 12,13).

At the hearing, contestant introduced evidence tending to show that the minerals present in the mining claims are not in sufficient quantity to mine them at a profit, and on that point the administrative hearing examiner decided adversely against the contestants. (Ja 157). On appeal to the Secretary of the Interior, contestants moved to be allowed to present additional evidence which "would tend to prove that the produc-

tion and sale of some of these minerals on local markets, and the fact of the cost of extracting the minerals, shall not be as high as calculated by the government witnesses. The evidence would have been in rebuttal to the unexpected opinion testimony introduced by the contestant on these matters. The motion was denied, on the ground that 'if the motion to produce additional evidence not in existence at the time of the hearing was granted, further hearing before an examiner at which all parties were represented would be required. (citations). Such action is not taken in absence of a substantial claim to equitable consideration on the part of the petitioners'. The decision also claimed that nothing in the record suggested that there was an equitable basis for reopening the hearing.

(Decision, Secretary, P.3) (JA 24,25) Further allegations under the same paragraph, stated that; "facts and circumstances, as basis for equitable consideration, exist on the record". Further, the Secretary of the Interior, as individual, as attorney for Andrew G. Jurko, who intervened at the hearing, personally knew at all times herein mentioned, certain basis of facts that would have called for fair, just and right dealing and for giving the contestees all the opportunity to present all evidence and matter of defense which they considered important to their case...". By reason of such denial, contestees alleged, they were denied due process of law, and that the decision of the Secretary of the Interior denied to the contestees the right to a fair and impartial hearing guaranteed to every litigant by the Fifth Amendment to the Constitution, and denied them the essential demands of justice. (JA 25).

Following the government's filing its motion for summary judgement, contestees served notice upon the adverse parties to take the deposition of Andrew G. Jurko upon oral interrogatories on the 2nd day of August, 1963, in Tucson where he resided. (Ja 36).

Immediately the appelles here, and Andrew G. Jurko, joined in a motion for an order to stay the taking of the deposition, under Fed. R. Civ. P 30 (b), on the ground, as to the appelles herein, Helmandollar and Secretary Udall had filed a motion for summary judgment. (JA 37).

Contestees opposed the motion to stay the taking of the deposition on the grounds that the information and matters bearing on the issues they expected to elicit from Andrew G. Jurko was necessary for contestants' preparation for their opposition to the government's motion for summary judgment, to shed light on the question of why contestants did not get a fair and impartial hearing at the administrative proceedings. (JA 38- 41).

In an order by the lower court on August 6, 1963, the court stayed the taking of Andrew G. Jurko's deposition until after October 20, 1963, (JA 41). The hearing of the motion for summary judgment filed by the government was set and heard on September 11, 1963. Andrew G. Jurko according to information, died and on agreement between appellant's counsel and Mr. Jurko's, conditioned on Mr. Jurko's attorney filing a death certificate, the case against Mr. Jurko was dismissed. (JA 58, 59). According to the death certificate filed by his counsel, Mr. Jurko deceased on August 25, 1963.

The lower court heard the government's motion for summary judgment, and counsel argued to the court. (JA 57-73) The court granted the motion for summary judgment in favor of the government, denied summary judgment to appellants and dismissed their complaint. (JA 74, 75). Appellants failed to receive the notice of the entry of judgment and the judgment itself; moved the court to vacate and re-enter the judgment. (JA 75, 76). Appellees opposed the motion. The motion to vacate and re-enter the judgment was granted. (JA 81). Following the granting of the order, appellants filed notice of Appeal (JA 82). Appelles filed notice of cross-appeal. (JA 90).

STATEMENT OF POINTS

1

Appellant's Point No. 1

THE LOWER COURT, IN ITS REVIEW OF ADMINISTRATIVE DECISION, ERRED IN SUPPORTING IT MERELY ON THE BASIS OF EVIDENCE WHICH IN AND OF ITSELF JUSTIFIED IT, WITHOUT TAKING INTO ACCOUNT MATTERS IN THE RECORD THAT DETRACT FROM ITS SUBSTANIALITY.

This point is directed to the alleged errors upon which Appellants intend to rely numbers 1, 2, 4 and 5.

2

THERE HAVING BEEN SHOWN PRESENCE OF MINERALIZATION OF A NATURE HAVING ACTUAL OR THEORETICAL VALUE OF SOME CONSEQUENCE TO LOW-GRADE MINING PRACTICES IN THE STATE WHERE THE MINERAL DEPOSIT IS LOCATED, THE LOWER COURT ERRED IN FAILING TO HOLD THAT, NOTWITHSTANDING THAT THE PRESUMED COST OF MINING WOULD BE MORE THAN THE COST OF RECOVERED MINERALS FOLLOWING DISCOVERY, IT IS NOT A BAR TO VALID DISCOVERY UNDER THE MINING LAWS.

This point is directed to the alleged errors upon which Appellants intend to rely numbers 2, 4, and 5.

3

WHERE ALLEGED FACTS AND EXHIBITS, NOT DULY DENIED BY GOVERNMENT MOVANT FOR SUMMARY JUDGMENT, RAISES A STRONG INFERENCE THAT CONTESTEES, IN A GOVERNMENT MINING CLAIM CONTEST, WERE NOT GIVEN FULL OPPORTUNITY TO PRESENT ALL THEIR DEFENSES, AND THE FACT THAT THE GOVERNMENT'S SO-CALLED OVERWHELMING EVIDENCE ACTUALLY IS INADEQUATE TO SUPPORT THE ADMINISTRATIVE

AGENCY'S DECISION, UPHELD THROUGH ADMINISTRATIVE APPEALS, INDICATE DECIDELY THAT THE OFFICERS EXERCISING QUASI-JUDICAL POWERS COULD NOT HAVE EXERCISED IT INDEPENDENTLY AND FREE OF THE INFLUENCE OF THE MANIFEST CONFLICT OF INTEREST HELD BY THE SUPERIOR ADMINISTRATIVE HEAD IN THE OUTCOME OF THE DISPOSITION OF THE CASE; AND THE LOWER REVIEWING COURT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AND IN NOT GRANTING IT IN FAVOR OF THE COMPLAINANT CONTESTEES, COMMITTED AN ERROR.

This point is directed to the alleged errors upon which Appellants intend to rely numbers 1, 2, 3 and 6.

SUMMARY OF ARGUMENT

We believe that we have shown in this brief that the administrative decision, upheld by the lower court, is not supported by substantial evidence, when the record is considered as a whole, in that the administrative agency's evidence completely failed in the following manner:

(a) Dr. Willard Lacey's evidence of quantitative analysis and estimate of value of the minerals found in the subject land are based on samples

(1) taken at only one spot from sediments out of a well dug in one of the four mining claims in question, of which drill hole samples represent only, according to another principal government witness, the mineralization of only that immediate area, and by another government witness, if samples are taken from only one location they mean very little and does not truly evaluate a piece of ground, and under the law, a sample from one spot is insufficient to prove a placer deposit, and improper to prove the mineral deposits outside of the claims where the samples were taken;

(2) and the total amount of the samples Dr. Lacey took is 2-1/2 pounds, about a cereal bowl full, as against the government evidence in the record that to fairly evaluate a piece of ground one cubic-foot of samples should be examined.

(b) Luther S. Clemmer's evidence, corroborated by his companion, Henry O. Ash, consisting mainly of his analysis and estimates of valuable minerals assayable, were based on samples taken from about the center of each subject claim and some from a wash and also from the sediment out of the well, and show the land to be mineralized and the minerals have a total theoretical value in an amount which is of significance to a miner in the state of the mineral deposits where the practise of mining low-grade ore is of common knowledge. The contestants agree wholly to Clemmer's tests and analysis and his values, which

they make use of in showing that they have valuable mineral deposits within their claims under the mining laws, sufficiently justifying a valid discovery.

Had the lower court considered the whole record and taken into account the fact that one part of the governments' proof is emasculated by its own evidence in the record, and the other part is available, just as well, to the contestees to refute the government contention and to prove their case, it would have arrived at to the inevitable conclusion that the administrative decision is not supported by substantial evidence, if at all. On such a basis the reviewing court should have granted the appellant mining claimants summary judgment in their favor.

By the laws which the administrative agency have developed the last sixty years, generally supported by the courts, we show that the fact the present mining operation would not be economically feasible, where the minerals present in the deposit is in themselves valuable, does not prevent contestees from making a valid discovery within their claims, under the mining laws.

Beyond these, since the administrative agency has not answered our allegations, nor filed affidavit or any documents in denial of the material facts in them, we have shown by a compelling inference that from the time the client of Hon. Stewart L. Udall, Andrew G. Jurko, must have complained to him, concerning the contestees, that the Hon. Stewart Udall, because of his pecuniary and professional interest in the land in question, must have some connection in the initiation of the government contest; that he had inspired or initiated the unalterable pace of the proceedings, which brook no delay, denying every request by the miners for an opportunity to present all their evidence and defenses; that he had a hand in the arbitrary and capricious requirements that the miners prove right then and there that the

values of the minerals present in the land must show that they can be worked at a profit, when it is not required under the mining laws; that his interest had influenced the appeal officer's decision, including those in the Secretay of the Interior's department who readily justified the administrative decision by reference to "overwhelming evidence", when as we have demonstrated, an examination of the record would have disclosed the complete failure of the administrative agency's proof to support the decision, " and even if it were corrupt," the government counsel contended before the court below, " it would still be right". All of which-- should bring down the Constition's condemnation of all arbitrary and reckless exercise of power.

ARGUMENT

Appellant's Point No. 1

THE LOWER COURT, IN ITS REVIEW OF ADMINISTRATIVE DECISION, ERRED IN SUPPORTING IT MERELY ON THE BASIS OF EVIDENCE WHICH IN AND OF ITSELF JUSTIFIED IT, WITHOUT TAKING INTO ACCOUNT MATTERS IN THE RECORD THAT DETRACT FROM ITS SUBSTANTIALITY.

The administrative agency, in making the motion for summary judgment, relies on the theory that minerals discovered by the mining claimants on the subject claims, the most important of which is magnetite, are not present in such quantity as to warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine; and that, it contends, this view is supported by ^{tax} substantial evidence in the record. (JA 29,60).

The lower court, in granting the administrative agency's motion for summary judgment, in effect, affirmed the administrative decision, based on that of the Hearing Examiner's, the determination of which rests on his findings, as follows;

" The contestant's very well qualified witnesses conducted reasonable quantitative tests of samples taken from the claims and estimated the costs of recovery of the minerals by conventional methods. The results of these quantitative analyses show that the theoretical value of the recoverable minerals present is far exceeded by the costs of the recovery and marketing thereof."

The qualified witnesses referred to above may be considered in two categories of proof, based on their sampling procedures, the amount of samples taken and tested, and their estimates of values, as follows;

(a) The testimony and evidence given by Dr. Willard C. Lacey, who took samples by himself, solely from the dumpings out of a well on one of the mining claims, in the total amount of 2-1/2 pounds,

which he tested on a Wilfley table. (JA 117, 124)

(b) The testimony and evidence of Mr. Luther S. Clemmer, corroborated by Mr. Henry O. Ash, who accompanied him taking samples from each claim and made careful and conscientious tests and assays. (JA 96,111).

The lower court has not made any findings of fact, but in the determination of the question of whether the agency action rests on adequate proof, it has apparently focussed its attention on Dr. Lacey's testimony, when it inquired of the counsel for the administrative agency, as follows;

" THE COURT: As I recall your findings, it was that there would be a net loss of \$400,000 per acre if an effort was made to commercially exploit this property. Is that correct?"
(JA 59).

The counsel answered in the affirmative, and stated, contending that "there is no evidence, at least nothing of substance, in the record that tends to refute that" and submitted the question on the record . (JA 59). The reviewing court obviously, we believe, was satisfied, having pursued no more the matter of evidence.

Appellants herein could not have refuted such a far-fetched opinion with another contrary opinion. Any refutation we shall do lies in the fallacy of the opinion itself, based on 2-1/2 pounds of sand, actually, and a mirage reflecting from a notion that a estimate of value derived from an examination and tests of a 2-1/2 pound sample of sand from dumpings out of a hole in one mining claim would do to prpve the value of mineral content of four mining claims covering a section of land.

Consequently, on cross examination of the mining claimant's witness, Glen Allen, asked whether there is any point on which he did agree with Dr. Lacey, answered; "Well, I can't think of any." We are in total disagreement with Dr. Lacey. (JA 137, 141). The contestant's own evidence could not agree with the sampling Dr. Lacey did from one location; in a statement in Contestant's exhibit No. 27, on the very last page, the report has this to say; "It should be noted that the sample

submitted for examination was extremely small. Some of the fractions containing valuable minerals . . . weigh so little that true evaluation cannot be done at this point. If the sample submitted represents material taken from one location only it means very little; however, if it is a component (composite) sample, or a number of samples thrown into one then it means a bit more. To truly evaluate a piece of ground for heavy minerals a number of one-cubic foot samples should be examined." (JA 114, Exhibit 27).

An examination of the testimony of Dr. Lacey shall bear out our claim of its lack of probative value, and further reveal its failure to prove anything.

Dr. Lacey testified that he examined the land in question, section 19, approximately a week before the hearing held by the agency's Hearing Examiner on March 16, 1960. He "walked over a good deal of the section" and "Then", he stated, "I went to the fan that was the sediment that was derived from the well and cut a little sample from the side of each one of the shovel cuts so I ended up with a sample of just two and a half pounds derived from the small cuts along the sides of these holes." (JA 117).

Although he claimed to have walked over a good deal of the section, the Contestant's expert witness refrained from cutting or taking any sample from any other place in the mining claims covering the section of land; neither did he take any sample from the diggings or pits which Mr. Clemmer testified that were down the large wash and across the south half of the said section. JA 99), the pits which Mr. Allen dug, the deepest of which is five feet (JA 142, Redirect). The claims being placers, the witness avoided taking samples from the river bed or washes. In the pits, Mr. Allen exposed layers of the heavy minerals (JA 142), and would, when mining, start mining the washes because of higher concentration of the heavier minerals. (JA 108). Dr. Lacey ignored and avoided these places, stating on cross-examination, as follows;

"Q. Did you take samples from the sand in the river beds?

"A. I did not take samples from the sand in the river beds, Ma'am..

"Q. None at all. The only digging you did, then, was in the well material?

"A. That is right.

"Q. How many holes did you dig in the well material?

"A. There were, I would guess, approximately a dozen to 15 holes in this fan derived from the well.

"Q. Did you dig them?

"A. I did not dig them. (JA 119, 120)

Then, witness Dr. Lacey stated as follows:

"I took this sample back to the University and ran it over a Wilfley table, made a rough concentrate of the heavy mineral components and then took this rough concentrate and ran this through a sink float separation using carbontetrabromide which separated those minerals that had specific gravity over 2.65, so it made a clean separation between the two. Then, taking the zinc fraction, the heavy fraction, I took a magnet and separated out the magnetic fraction which contained the magnetite fraction and made a number count on the magnetic fraction" (JA 118).

It is not surprising that in his extraction process, he was only concerned with the magnetite mineral, which to him the principal use for magnetite is as an iron ore (JA 120, bottom of the page), since out of so puny 2-1/2 pounds of sample, "About the only thing you can figure of any value is the magnetite". (JA 119 , top of page). Of, course, necessarily, he missed the other valuable minerals found and assayed by the agency's witness Mr. Clemmer, such as besides garnet, titanium, zirconium, silver and gold (JA 109,110), and which Mr. Allen also found (JA 127). So, it was only the magnetite in the sample that Dr. Lacey considered, and he figured out the gross value of the magnetite per acre of land. (Insert page between pages 118 and 119 , JA). Of the magnetite mineral alone, Dr. Lacey stated as "the cost to

extract it on the basis of my estimates, including a wasting cost for clay, would come up somewhere in the vicinity of \$466,000 per acre, so my calculations on the operation in section 19 would be that they would end up with a net loss of \$406,000 per acre". (Insert page JA 119A). Presumably, we believe this estimate is available by the process or mining method he would use ordinarily to recover the minerals with "a shovel and a truck hauling", which he considered "probably be the most economical way of handling it". (JA 119A). It is no wonder therefore that the witness came up with a fantastic and unbelievable estimates; and in a country of machines and automations, gadgets of any kind and for any purpose, and advance technology know-how, the learned witness recommends a shovel and a truck, outraging common sense. Dr. Lacey has been, then, in Arizona for five years, and has no Arizona Mining experience, and manifestly, he is not cognizant of what the five Justices of the Supreme Court of Arizona have to take judicial knowledge of, that in Arizona, through advance methods of mining, milling and reduction, have come the practise of mining low-grade ores, often covered with alluvial material. (WOOLSEY v LASEN 91 Ariz. 229, 371 P 2d 587).

Of course, if the witness could validly, out of a value of one mineral he extracted from a 2-1/2 pounds of sand sample, taken from one location, prognosticate the value of minerals in a claim of a quarter of a section of land per acre, and of the whole section, he could just as well make an estimate of the value of minerals in the County of Pima, Arizona, as well as in the next county. However, the administrative agency's witness, Mr. Clemmer, testified, as to such samples taken from the well drillings, as follows;

"Q. ... Do you think that a composite of a single hole is adequate evidence of anything?

"A. I think it is adequate evidence--are you referring to drill hole samples?

"Q. Yes, I am.

"A. Yes. I think that is adequate evidence of the material within that immediate area." (JA 115). (Underlining supplied.)

That the samples from the well hole is evidence of the material within that immediate area is good common sense, which would agree with the physical facts. This testimony of the agency's witness is in derogation of the Dr. Lacey testimonial evidence of his estimate of value he derived from his examination of 2-1/2 pounds of samples from the sediment at the well hole in one location. If it proves anything, Dr. Lacey's estimate of value concerns only the immediate area of the well hole. It could not show mineralization in a mining claim. "A single sample from one claim has been held not to indicate a discovery of a large quantity of low-grade ore." (United States v. Lem A. & E. H. Houston, 1959, 66 ID 161). Decidedly, the Dr. Lacey estimate of \$406,000 loss per acre, on a mining operation of section 19, would not be a proof of the mineral value found present in the four mining claims comprising the section in question.

This fact, and the fact in evidence which the Contestant introduced to the effect that if the sample is taken from one location only it means very little, and that to truly evaluate a piece of ground for heavy minerals a number of one-cubic foot samples should be examined, as against Dr. Lacey's 2 1/2 pound sample, which would not have measured a fifth of a cubic foot, materially detract the government's proof completely, -that's knock off the legs of the administrative agency's proof; thereby the decision of the administrative agency, and its affirmance by the Secretary of the Interior, is not supported by substantial evidence.

The Lower Court, in upholding the administrative decision, by granting the appellees summary judgment, and denying the cross-motion for summary judgment by the appellants, manifestly ignored to consider the record and, manifestly, merely picked that which would have justified the administrative conclusion, in complete dis-

regard of the inhibition by the United States Supreme Court, which says:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting an administrative decision merely on the basis of evidence which in and of itself justified it without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

(Universal Camera Corp. v. National Relation Board, 71 S. Ct. 456, 464, 340 US 474, 95 L Ed 456)

Appellants respectfully submit that the reviewing Lower Court committed reversible error.

(b) On the other hand, while the Lower Court has failed to scrutinize the Dr. Lacey evidence, it has overlooked the true worth of the Clemmer evidentiary proof. It simply assumed, we believe, that it was just corroborative to the more flamboyant Dr. Lacey testimony and geometric figures of his estimates, as the agency hearing examiner had done.

The Luther S. Clemmer evidence differs in essential particulars from Dr. Lacey's. Mr. Clemmer, accompanied by Mr. Henry O. Ash, took samples from near the center of each of these placer claims in question in section 19, and from a hole one foot in diameter and 15 to 18 inches deep. They were bagged and carefully identified for latter processing. (JA 101). In addition to the four samples from each of the claims, he took one from a spot in a wash, and a composite sample from the dumpings of the well. These sampling method would satisfy the statement in United States v. Lem A. and E. D. Houston, 66 ID 161, as follows: "The best evidence of the finding of minerals in a lode, vein, or deposit on the claims, and of the value of the specific samples taken,

would seem to be reports prepared from an analysis of samples carefully taken from specific points upon the claims, which can be properly identified. A single sample from one claim has been held not to indicate a discovery of a large quantity of low-grade ore."

We have printed in the Joint Appendix an extended excerpt of the manner and steps taken by Mr. Clemmer in processing and testing each sample and of his careful and conscientious analysis and the record of the values he found from each identified material and of the values of the minerals found, (JA 103-111), which were of significance, for the better understanding of the Court of the mineralization of the land in question and of the extent of the dispersion of the minerals, because, if the tests and analysis from these samples do show anything, they should indicate clearly the existence of a large deposit of low-grade ore found within the subject claims, which, when considered in a region or state where low-grade mining is practiced, would be of real significance, indeed.

The appellants agreed with Mr. Clemmer's testimony and proof on the sampling, the tests and analysis of the samples taken and with the values he obtained of the minerals present, the more extensive of which is magnetite, when, at the hearing before the agency's examiner, appellants' witness, Glenn Allen, on cross-examination, stated that he agreed with Mr. Clemmer "pretty much".

Just as Mr. Luther S. Clemmer says, in answer to questions on direct examination,

"A.....Mineralogically there are present in this alluvium some black sands referred to as heavy minerals which our testing showed to be present.".....

"Q. At this time would you tell us what black sand is, since it will probably be very important in this hearing.

"A. Well, black sands are black or dark minerals, dark and red. They are those that look black when you see them in a wash or your concentrates. They appear to be black. Some of those

minerals, of course, come in various colors, but they normally the darker colors and they are normally heavy, not too heavy specific gravities of three and a half, three, three and a half, four to five." (JA 96, 97).

"Going further under this exhibit 28, and here again we have given the locator every benefit of the doubt, we have used the value of iron in this particular exhibit as 60 to 68 per cent of iron because they can make concentrate that will run between 60 -- higher than 60 per cent iron if concentrated down far enough, so we used the figure 60 to 68 per cent iron from E. & M. J., which is a Swedish magnetite imported, which shows a value of \$11.50 per long ton which would be 52 cents per pound." (JA 109).

Accordingly, you can make a higher concentrate, if you concentrate the material far enough, and obtain higher values. It follows, that the amount of recovery of the mineral could be made higher, depending how you worked at processing it. Be that as it may, we shall take the ordinary concentration process which Mr. Clammer employed to the rest of the samples, and we go along with the value of the iron, from two samples, which may be taken to be representative, of 20.8 cents per yard alluvium. (JA 106), which is close enough to Dr. Lacey's value of the rion, which is 20 cents per yard according to his studies. (JA 119A, top lines).

However, there were other minerals of value, of which he stated their value in money, and, for these minerals, he came up with a total theoretical value of 59.28 cents per cubic yard of alluvium. (JA 110, middle of page). Appellants have no quarrel with this figure. At the administrative hearing, appellants' witness Mr. Glenn Allen, on cross-examination, stated as follows:

"Q. I believe you stated you agree with Mr. Clemmer on everything but his costs on the dredging operations; is that right?

"A. Yes.

"Q. Did you hear him testify about the amount of minerals that is found in the material on section 19?

"A. Well, he had to take the facts. He only had a sample so deep. He couldn't tell what was below that. He had to go on what he put the test on.

"Q. Will you say he went to the wrong place to get his samples?

"A. No. If he had gone three or four feet deeper--

"Q. What if he went one foot away?

"A. One foot the other way it might have been twice as good."

"Q. Can you go any higher than twice as good?

"A. Oh, may be.

"Q. He indicated that if he went twice as good it would not be any good.

"A. He indicated we would lose at that figure but if we could work it any cheaper we could do it at a profit." (JA 141, 142).

Mr. Clemmer and Mr. Ash did not take the samples from the pits and cleared areas which Mr. Clemmer said he saw on his visit on December (1959) down the large wash and across the south half of the section; the pits were dug by Mr. Allen, the deepest being five feet, and exposing layers of black minerals half inch thick (JA 142). Except from a spot on a wash, where they took one sample, they did not sample the washes. Notwithstanding, their values represent that, if you dig in the ground within these claims for 15 inches deep you would come up with a low-grade ore, which if you could work it cheaper than what Mr. Clemmer roughly assumed it would cost to recover, you could work it at a profit.

That far, appellants, as early as the administrative hearing, have agreed with Mr. Clemmer and with his evidence of sampling and with his tests and assays and the values which he derived therefrom, and we make use of them herein to show that valuable minerals found in the subject claims have actual theoretical values of real significance. Evidence coming from witnesses on opposite side is available to any

party to a lawsuit. (Bradford Builders Inc. v. Sears Roebuck & Co., 270 F 2d 649, L (C.A. Fla.), where it is said; " it is Hornbrook law that evidence coming from witnesses on the opposite side (as well as from its own witnesses) is available to any party to a lawsuit."

From the testimony of Mrs. Emojean Girard, she and her husband made a methodical sampling of the section of land in question and conducted tests of the samples from specific point within the claims and came up with percentages of values of metal minerals they found and have their other samples sent off to a laboratory for spectrographic analysis, the results of which are on file as evidence. Their samples and the results therefrom indicate the presence of valuable minerals within the claims in mineable quality and in percentages which should corroborate the studies of Mr. Clemmer. (JA 146, 150-153). Inadvertently, page 146 was separated from main portion of the testimony). It is to be noted that Dr. Lacey also employed spectrographic examination on the samples he took according to his testimony, as follows:

"Q. Let's see. You took this one sample from the well and you ran it over the Wilfley table and you tested the heavy material from that; is that correct?

"A. That is right.

"Q. And you gave that what kind of an examination?

"A. Examined it under the (s) pectrographic microscope.

"Q. Which determines what?

"A. Which permits me to tell what minerals are present."

(JA 121, top half of page).

Then, with a magnet, Dr. Lacey drew the magnetic minerals, made a count, and from his test of them, of the magnetite alone, he managed to spin his alleged fabulous estimate of a loss of \$406,000 per acre on a mining operation of the subject land. Since it was seen fit to give his examination of the samples full weight by the Hearing Examiner and by the lower court, in error, the Girards' examinations and tests and

laboratory reports should have been given similar consideration. Spectrographic examination of the universe, since Galileo, has been employed to measure, weigh and determine the matter and elements present in the stars, and most recently and by recent events which the court could take judicial knowledge of, the data gathered from the science of spectrography was used successfully in the initial exploration of the moon.

By another process, Mr. James Concannon, testifying for the appellants, recovered pure magnetite at the rate of 25% of the material submitted to him in quite large quantities, rich quantitatively in magnetite. (JA 153-156). This is not surprising since Dr. Lacey was given, on cross examination, similar ore to examine with naked eye and a magnifying glass, and what he saw evoked from him these words; "If I saw this much magnetite in the sand I would continue to look further." (JA 124).

The testimonies and evidentiary proof by the witnesses-- Mr. Clemmer, corroborated by Mr. Ash, and the appellant's witnesses and their proofs and evidentiary matters, -leave no doubt that the minerals discovered in the subject mining claims are highly significant in the light of the following opinion of the Supreme Court of Arizona, the state locale of these mining claims, in which the Court says;

"(16), We take judicial knowledge that in Arizona during recent years there has come about through advanced methods of mining, milling and ore reduction, the practice of mining low-grade disseminated ore bodies, often covered by alluvial material to some depth." (Woolsey v Lassen 91 Ariz. 229, 371, P.2d 587).

As far as Mr. Clemmer testifying from personal knowledge , his accounts is entitled to full credit. Otherwise, when he ventured an opinion not based on facts, his guess is as much as anyone else.

Appellants differed from Mr. Clemmer's testimony on the matter of dredging operations method of recovering the minerals

which he thought could be employed in Arizona as was done at his employment in a firm in Illinois, in which the cost of the operation was 30 cents per yard, by dredge floatation. So he simply doubled the 30 cents and hazarded the opinion that it might cost 60 cents to recover the minerals in the subject claims by some other process of no specific nature. Glen Allen, who had done dredge floatation mining in an isolated eastern part of the state of Arizona, testified that he and his partners were doing dredge floatation at lesser cost than the 30 cents cost in Illinois, Tr. Proc. H.E., 210,211), saying on cross examination as follows;

"Q. You are in total disagreement with Dr. Lacey. What about about Luther Clemmer here? You heard his testify too, did you?

"A. Yes, Well, I agree with Mr. Clemmer pretty much except on the dredging where he brought up the 30 cent figure for bucket line wet suction. It can be worked on this type for about a third or a half." (JA 141).

Mr. Allen testified to dredging operations in New Mexico of which he personally was acquainted (JA 127, bottom of page), which costs under 30 cents, which he considered pretty high. (JA 128). He checked with Thurman and Wright and got an estimate of cost between ten and fifteen cents for a suction dredge. He also mentioned other dry processes and of various other processes of his own investigations, which would cost just as reasonable when employed in recovering the minerals in section 19. (JA 128,129,130,131,132,134).

Mr. Clemmer did no dredging in Arizona, nor mining in Arizona, as he so testified, as follows;

"Q. In your estimate (estimate of cost of recovery) then, it was quite hypothetical that you had no actual knowledge of how the area would be mined.

"A. I was basing it on my experience in this type of work.

"Q. You have done none of this type of work in Arizona.

"A. That is true. I have done no dredging in Arizona.

"Q. Not necessarily dredging, but mining in Arizona, placer mining.

"A. No, I have not done any placer mining in Arizona. that is true." (JA 116)

Not having done any dredging operation in Arizona, nor did mining in Arizona, it is unlikely he could qualify as a "prudent man" who could say that the low-grade deposit of ore, samples of which he tested and assayed competently, could not be mined profitably because he thought he could double the 30 cents it cost to operate the dredge mining in Illinois, in contradiction of what the Supreme Court Justice of Arizona have judicial knowledge of the known practice of successful low-grade mining in Arizona.

We believe that in determining who such "Prudent man" may be, whose judgment may be referred to as to whether a given mineral deposits may be worked profitably, we should have to resort to the provisions of section 22,30 USCA, which provides in pertinent part as follows; "... all valuable mineral deposits in lands belonging to the United States, . . . shall be free and open to exploration and purchase . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining district, as far as the same are applicable and not inconsistent with the laws of the United States." It follows then that if the exploration and purchase of all valuable mineral deposits in lands belonging to the United States shall be made, besides under regulations prescribed by law, according to local customs or rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States, it is reasonably logical, therefore, that the ordinary man of prudence must be found in the locale or within the mining district where the mineral deposit is located, and in the light of mining practices in the district. An ordinary man in a mining district where mining consists of picking nuggets, or hacking chunks of pure silver or copper, or in a district where base metals are not mined, would have no idea about mining any other ore deposits, and it shall be illogical and against the intention of Congress, we feel, to leave to the judgment of a man, other than one familiar with local mining practices, to con-

sider whether a given deposit of minerals would justify him in spending his time, money or effort in developing a mine.

The "prudent man" in a prudent man test, as a unit of measure of mineral content present and available within a claim, is necessarily a person, who is aware or has knowledge, as do the justices of the Supreme Court in Arizona, in the above cited cases, of the practices of advanced methods of mining and processing of large low-grade disseminated ore bodies or deposits, who with such knowledge could reasonably expect to develop a mine of value to his economy, or to his community, or add to the economy of his country. We respectfully submit. It would be unreasonable, nay senseless, to leave the development of valuable minerals to less informed persons or persons whose lack of investigation, though well meaning, or persons who just would not take notice of other mining operations beyond a shovel and a truck hauling. Otherwise, Arizona, by low-grade mining methods, would not have led the nations of the world in the production of copper. Arizona possesses vast areas of the magnetite, source of iron and steel, whose potentials are just being exploited.

Of the magnetite deposit alone in the section of land in question, Mr. Glen Allen, the locator of the mining claims therein, testified to wit: ". . . Well, but I had enough confidence in knowing myself there was enough magnetite to mine at a profit." (JA 127). He is a practical miner, and possesses knowledge of Arizona mining practices.

"In order to locate a valid claim, there must be a discovery within the confine of the claim or some mineralization of a nature that has actual or potential value and although it need not be of any particular assay or richness in quality, nor any specified amount in quantity, nor need it be sufficient that it would immediately pay mining expenses, it is only essential that the discovery be of such significance that a practical, experienced miner of prudence and judgment would deem it advisable to pursue the vein or lead, thus furnish and expend further time, effort or money in attempting to develop the property as a mine." (RUMMELL v. Bailey, 1958, 7 Utah 2d 137, 320 P 2d 653).

APPELLANT'S POINT NO. 2

THERE HAVING BEEN SHOWN PRESENCE OF MINERALIZATION OF A NATURE HAVING ACTUAL OR THEORETICAL VALUE OF SOME CONSEQUENCES TO LOW-GRADE MINING PRACTICES IN THE STATE WHERE THE MINERAL DEPOSIT IS LOCATED, THE LOWER COURT ERRED IN FAILING TO HOLD THAT, NOTWITHSTANDING THAT THE PRESUMED COST OF MINING WOULD BE MORE THAN THE COST OF RECOVERED MINERALS FOLLOWING DISCOVERY, IT IS NOT A BAR TO VALID DISCOVERY UNDER MINING LAWS.

There is no dispute that mineralization in the form of such intrinsic minerals as magnetite, zircon, and others, assays of which showed value, and that the theoretical value of the minerals recoverable is 59.28 cents per cubic yard of material. The leading government witness indicated that were these minerals recovered by dredge floatation process, it costs a mining firm the witness had worked for in Illinois 30 cents per cubic yard of material. Although appellant's witness testified that certain dry as well as wet processes, on the market cost less to extract the minerals found within the subject claims and that in a dredging mining experience appellant's witness Glen Allen had in the eastern part of Arizona, it cost him and his partners to operate the dredging process 25 cents which ran up to 29 cents per cubic yard, still if the cost of extraction can be kept up to 30 cents per cubic yard, the difference between 59.28 cents value of recoverable material by that process and 30 cents cost of extraction shall be of consequence in the state of Arizona where as the Supreme Court of Arizona knows that low-grade ore have been in recent years being mined in Arizona. It remains as a physical fact that the subject land is mineralized and that the minerals of intrinsic value are present, just as the low grade copper ore are, which no amount of opinion can alter that physical fact. The only variable thing, (just as Dr. Lacey admitted that the matter of extraction is variable), is the method of mining operation employed. In Arizona as indicated by judicial knowledge taken by the Supreme Court of Arizona, *Supra*, the problems of low-grade ore mining has in

recent years successfully been solved. As a result the practise of mining low-grade ore placed Arizona as the leading copper producing state in the world.

Again, the physical fact of mineralization of the subject land and the presence of valuable minerals therein will remain to be the same, who ever make a mining location upon it -- whether by a poor prospector prospecting with a burro or by a large capitalized corporation or a modestly capitalized firm, mining low-grade copper ore in Arizona. Mining laws do not specify how well-to do a person should be who could make or be entitled to a valid discovery of valuable minerals in the lands of the United States. A poor miner may, as well as the rich, make a valid discovery of a mining claim, and if the ore is low-grade, an Arizona low-grade mining operator, by certain arrangements commonly available in various forms, can make a low-grade mining claim profitable. In the record, from Mr. Glen Allen's testimony, he filed over a thousand such claims as those in question and mostly for certain established mining companies, and that the magnetite mineral alone present in the subject claims is as much as in the other claims to the north in Pinal County, Arizona. Let us not lose sight of the fact that Mr. Clemmer's values were derived from the subject claims top soil, fifteen inches deep, and yet it had a theoretical value, which if the mining cost could be kept down to 30 cents per cubic yard of material, will leave a margin of 29.28 cents. And, if you concentrate farther down, Mr. Clemmer testified, you will get higher values. It further shows, therefore, that the physical fact of the mineralization of the subject claims remain a constant factor; (and not being the common variety of sand and gravel for concrete construction or for other purposes we use them for), the showing of commercial profit is immaterial, and is not required under the mining laws.

In the case of the United States v. C. F. Smith, 1959, 66 LD 169, in which the Forest Service initiated the contest over a placer mining claim, it has been held that

"The mining laws do not require as the Forest Service suggests

that the values shown must be such as will demonstrate that a claim can be worked at a profit or that a profitable mining operation can be brought about," under similar facts as those in the case at Bar.

It has been ruled out that the ore need be of commerical quantities which will yield a profit in the following cases, among a number of state cases, -- East Tintic Consolidated Mining Co., 43 LD 79; United States v. M. M. Mouat, 61 ID 289; Freeman v. Summers, United States, Intervener, etc., 52 LD 201.

In view of the administrative agency's decisions with regard to mining claims, where minerals in themselves valuable, are present, that values shown of the minerals need not demonstrate that the claims can be worked at a profit nor that it can be developed into a paying mine, the agency's decision in the case at Bar and the imposition made by the government agency requiring the appellant mining claimants to show the value of the minerals found in their claims could be developed at a profit or that of sufficient quantity to work it into a profitable mine, is decidedly capricious and discriminative, arbitrarily exercised on selfish considerations. In the absence of higher judicial authority holding otherwise than the opinions prevailing in the above cases, and in the absence of statutory provisions requiring the need of a showing that the value of the minerals present in the claims can be mined at a profit in order to establish a valid discovery, the lower court should have held that such requirements is not a bar to valid discovery of a mine under the mining laws, the administrative agency definitely having found that the subject land is mineralized, and with minerals in themselves valuable, as distinguished from the common variety of sand and gravel. In failing to do so, the lower court committed error, and the judgment it rendered is contrary to law.

APPELLANT'S POINT NO. 3

WHERE ALLEGED FACTS AND EXHIBITS, NOT DULY DENIED BY GOVERNMENT MOVANT FOR SUMMARY JUDGMENT, RAISE A STRONG INFERENCE THAT CONTESTEES, IN A GOVERNMENT MINING CLAIM CONTEST, WERE NOT GIVEN FULL OPPORTUNITY TO PRESENT ALL THEIR DEFENSES, AND THE FACT THAT THE GOVERNMENT'S SO-CALLED OVERWHELMING EVIDENCE ACTUALLY IS INADEQUATE TO SUPPORT THE ADMINISTRATIVE AGENCY DECISION, UPHELD THROUGH ADMINISTRATIVE APPEALS, INDICATE DECIDEDLY THAT THE OFFICERS EXERCISING QUASI-JUDICIAL POWERS COULD NOT HAVE EXERCISED IT INDEPENDENTLY AND FREE OF THE INFLUENCE OF THE MANIFEST CONFLICT OF INTEREST HELD BY THE SUPERIOR ADMINISTRATIVE HEAD IN THE OUTCOME OF THE DISPOSITION OF THE CASE; AND THE LOWER REVIEWING COURT, IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AND IN NOT GRANTING IT IN FAVOR OF THE COMPLAINANT CONTESTEES, COMMITTED ERROR, AND DID SO CONTRARY TO LAW.

From the inception of the case at Bar in the defendant administrative agency, appellants have the feeling that the contest proceedings has been rushed as on a monorail, begging the indulgence of the court, to do away with the claims and interest of the appellants to the subject land, which we could not help but think from the facts and circumstances attending the contest from the record as follows:

Three months and 15 days after the filing of the location notices on the four mining claims in question, the defendant Roy T. Helmandollar, as manager of the Land Office at Phoenix, Arizona, filed the complaint on an adverse contest against the mining locators and their assignees, on December 15, 1959. (JA 7,8). Two months previous, on October 8, 1959, the Hon. Stewart L. Udall, addressed a letter to Mr. Glen Allen, one of the locators on the subject lands and after first stating his client Mr. Andrew G. Jurko owns the adjoining section 18, made representation upon the locators that they had located a placer mining claim on Mr. Jurko's property and were making a re-entry on said land, (JA 32) when in fact they have not; and Mr. Luther S. Clemmer from the Bureau of Land Management Office, on October 6, 1951, went out to the subject claims with Mr. Andrew G. Jurko, client of Hon. Stewart L. Udall, testifying at the examiner's hearing as follows;

"A. Well, the first time we went out to these claims was, I

believe, October 6, 1959, and Mr. Jurko accompanied us because we had some correspondence in our office with him".

"Q. Identify Mr. Jurko.

"A. Mr Jurko is the gentleman ---

"Q. No, not in the room. He was a grazing lessee?

"A. Yes, he held a grazing lease on this particular section for many years. He accompanied us on the land primarily to acquaint us with the area and he pointed out the north-west section corner for us of section 19. (Tr. Proc. H.E., p.29).

Mr. Jurko had at one time a grazing lease, which had long expired before appellants located their mining claims. (JA 5). A man, whose known address is a postoffice box number, Stanley C. Soho, had filed a Public Sale Application in 1956, for all of section 19 (JA 5). Mr. Jurko never protested, nor complained of said public sale application. When this case filed in the District Court for the District of Columbia, Soho though served a summons, never made any appearance. Mr. Jurko did, and when appellants filed and served a notice to take the deposition of Mr. Jurko (JA 36), the government attorneys and Mr. Jurko's attorneys jointly opposed the taking of the deposition (JA 37) and moved to stay the taking thereof. Appellants intended to use Mr. Jurko's deposition which was set for August 2, 1963, for appellant's use in their opposition to said government's motion for summary judgment, and opposed the motion to stay. (JA 38). The lower court ordered the taking of Mr. Jurko's deposition stayed until after October 20, 1963, (JA 41). The hearing of the appellees motion for summary judgment was set and took place on September 11, 1963, and the appellants were deprived of the use of Mr. Jurko's deposition and the discovery we expected to secure from such examination of Mr. Jurko as to his relations and of the employment of Hon. Stewart L. Udall in connection with section 19 in question as to give rise to his passionate claim of his ownership of said section 19 which he attempted to assert (JA 53,54), and drove away appellant's workmen from the claims (JA 51). Mr. Jurko died

according to a death certificate, supplied by his attorney, on Aug. 25, 1963, (JA 74), and appellants agreed to have the case against him dismissed.

From the record, on October 8, 1959, about the same day of Hon. Udall's letter (exhibit "A", JA 32) to the appellants, and two days after Mr. Jurko took Mr. Clemmer of the Bureau of Land Management to section 19 in question, Mr. Clemmer started taking samples of the material within the mining claims. (JA 101), and as we stated above, defendant land manager filed the contest complaint on December 15, 1959, three months and 15 days from the filing of the location notices by appellants. The hearing of the contest was set for March 16, 1960, (JA 9), and on March 4, 1960, more than 10 days before the hearing, contestees made a request for a postponement of the hearing on the grounds that they were experiencing some difficulties in compiling their evidence and because of the illness of their material witness, (JA 10), which request was denied by the Hearing Examiner Rudolph M. Steiner, (JA 11). Appellants alleged that such denial was unreasonable and not within the meaning of the administrative regulations, and postponement of it would not have prejudiced the contestant government. (JA 11, 12).

At the opening of the hearing on March 16, 1960, contestees moved the examiner and made another request, (JA 93.94) and was denied, in spite of the fact that administrative regulation of defendant agency accorded a contestee one postponement, so we alleged in our complaint (JA 13), and that the action is arbitrary. The hearing was held, testimonies taken, on said March 16, 1960; and on August 24, 1960, the Hearing Examiner issued his decision and was adverse to appellants, we alleged. (JA 14). The case went through administrative appeals, and during the pending of the appeals Hon. Stewart L. Udall, elevated from the House Committee of the Interior and Insular Affairs, was sworn as Secretary of the Interior on January 21, 1961, and also became the head of the Department of the Interior, (R.S. Sec. 437, 5 USC 481), and under the statute the Secretary is "charged with the supervision of public business" relating to the following: the public lands, including mines, and the Bureau of Land Management and Bureau of Mines, as amended June 17, 1957.

(JA 27, 28). On February 17, 1961, the Director of the Bureau of Land Management rendered his decision and adversely, affirming that of the hearing examiner's against the contestees. (JA 28). (Decision, Director).

Appellants appealed to the Secretary of the Interior, and made a motion, supported by affidavit, to be allowed to present additional evidence to show marketability of the minerals and evidence to show that the cost of extraction is much less than what contestant's witness claimed to be. The evidence would have been in rebuttal, not available at the hearing. The Secretary, or the official handling the appeal, denied the motion on the grounds that to grant it would make it necessary to re-open the hearing and the government would have to spend more money and time and on the ground of lack of equitable considerations presented. (Decision, Secretary). The decision of the Secretary of the Interior, by an appeals officer, was rendered on June 22, 1962, affirming that of the hearing examiner. Appellants claimed that because Hon. Stewart L. Udall, as an individual, at all time has a direct and pecuniary interest in the outcome of the contest against the subject claims, because of his actions and utterances in the press and at public appearances in which he made remarks concerning the subject land adverse to the locators, the hearing and administrative appeals proceedings were not fair and impartial.

The foregoing facts, and appellants' contention that the acts were arbitrary, and ^{were} abuses of discretion, have been alleged in our complaint below. (JA 2 - 31). The appellees filed no documents or proper affidavits controverting or denying our allegations. The allegations of the complaint charging the above related facts, must, for the purposes of defendants' motion for summary judgment, be deemed true. (Schwartz v. Broadcast Music, Inc. (Sd NY 1959, 180 F. Supp 322). On summary judgment, the inferences to be drawn from the underlying facts contained in the complaint, exhibits, affidavits and other materials before the court, must be viewed in the light most favorable to the party opposing the motion. (United States v. Diebold, Inc. (1962) 369 US 654, 5 FR Serv. 2d 56.41, case 13).

On motion for summary judgment, plaintiffs' material allegations and contentions of fact must be accepted as true, and he must be given the benefit of the most favorable inferences which reasonably can be drawn therefrom. (Federal Rules of Civil Procedure, Rule 56 (e), 28 USCA. Jeffrey v. Whitworth College, D.C. Wash., 1955, 128 F Supp 219).

Appellees' counsel in the court below contended that the Secretary himself did not handle the decision and "instead the decision followed the usual course, went to the Solicitor and the decision was made by the deputy solicitor." That may be quite true and a regular routine of business; and, may we as well state that the Solicitor, Mr. Frank Barry, who used to practice law in Tucson, Arizona, with Hon. Udall, is Secretary Udall's appointee. But this is not a case in which a judge, having a personal interest in a case, steps down and lets another judge hear the case and render a decision. A high official in Hon. Udall's category and the powers available to him, including appointment or nominating subordinates, has vast opportunity to influence the course of any business matter processed through his office and down to the land district offices and in the field. The statute gives such officials much power and flexible discretion in all business dealing with public lands and the mineral lands and mines. And because, the routine of government business transactions are done through delegations to subordinates, an official head of the administrative department will have ample opportunity to hide behind the system, knowing the system, and thereby escape responsibility.

It was not Hon. Udall himself who issued the denial of appellants' motion to be allowed to present additional evidence and it was not himself who stated the ground for such denial, that "If the motion to produce additional evidence not in existence at the time of the hearing was granted, further hearing before an examiner at which all parties were represented would be required. (citation omitted) Such action is not taken in the absence of a substantial claim to equitable consideration on the part of the petitioners." It was his office. As to which line of reasoning, the Supreme Court of the United States in Atchison, T. & S. F. R. Co. v. United States,

49 S Ct 106. 284, 76 L Ed 273, says,

" The prospect that a rehearing may be long does not justify its denial if it is required by the essential demands of justice."

and where

". . . hearing, suitably requested, which would have permitted the presentation of evidence relating to existing condition, was denied." The court says: "We think that this action was not within the permitted range of the Commissions discretion."

The hearing before the Hearing Examiner, the only hearing held in the administrative proceeding, is not a full hearing as contemplated by Congress. At the start, when the Hearing Examiner asked whether there were any questions as to the issues before him, Mrs. Girard, counsel for the contestees, inquired whether the contestees will have to prove that the minerals were of an amount that it will be profitable. The Examiner mentioned the case of United States V. Foster to give him guidance. From the interchange between the attorneys and the Examiner, no one seems to have any idea what the case is about and what it holds. (JA 94, 95). Mrs. Girard's point was not satisfactorily answered because the interchange concerned whether the case was an administrative decision or the Court of Appeals as claimed by the contestant's attorney. Just the same, the Examiner over-ruled Mrs. Girard's objection. After the government witnesses had given testimony and their opinion as to the matter of profit and commercial returns from mining the land, Contestees' counsel renewed her objection, as follows, --- "At this point counsel would like to say that the objection stated the other day to the amount of evidence necessary to prove the case is still objected to by counsel on the ground that the United States v Foster is not applicable to this situation. In that case they had a sand and gravel containing non-metallic mineral. Ours contains metallic mineral as is stated by the contestant. , Although I am bringing

in evidence which other-wise had not been necessary, I am not waiving my objection.")JA 131,132).

The contestees were confronted with an issue which the law does ^{not} require to overcome the contestant's testimonial evidence on commercial value and to demonstrate that the minerals will pay the mining expenses and make a profit, so soon after the initial discovery of valuable minerals. They had not at the time of hearing compiled sufficient evidence on that issue and to rebut that of the contestant's. The motion for leave to introduce additional proof was to supply that seeming discrepancy.

"An administrative hearing, in the exercise of judicial powers must be fair, open, and impartial. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored. The breadth of administrative discretion places in a strong light the necessity for maintaining it its integrity the essentials of a fair and open hearing. When such a hearing has been denied, the administrative action is void."

(42 AM JUR, Public Administrative Law, p. 479).

In the case of Morgan v. United States, 58 S Ct 773,999,304 US 1, 82 L Ed 1129, the Supreme Court says,

"Congress, in requiring a 'full hearing', had regard to judicial standards,-- not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature . . . The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps".

That is, fairness, we believe, should have been observed and practiced in this case from the proceeding before the Hearing Examiner to that in the Secretary of the Interior.

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. . . . And if the government's contention is correct . . . It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat.

Such authority, however, beneficially exercised in one case, could injuriously ^{be} exerted in another is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate, or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'. (Interstate Com. Com. v. Louisville & N.R. Co., 33 S Ct 185, 227 US 88, 57 L Rd 431). (Emphasis supplied).

The state of the evidence which the government depends upon to support its decision, we have shown in our discussion in Appellants' Point No. 1, the valid and useful part of which helped prove Appellants' case. It should be needless to say that, if government's proof fails, the administrative officials exercising quasi-judicial powers could not have exercised the judgment on their own independent deliberations. In the proceeding in the court below, on the hearing of the government's motion for summary judgment, to the court's query to the government counsel, to wit:

"What do you say about the allegations that the Secretary of the Interior was personally interested in the outcome of the case"? (JA 19), the government's reply relevant to the question was as follows;

"Furthermore, the evidence is over-whelming in support of

the decision; and even if it were corrupt, it would still be right." (JA 20). 9E (Emphasis supplied).

It is with such a cynicism, if the court please, which, in light of the record, the administrative decision, and the lower court's justifying it, was arrived at. And we submit to this court for review.

"Even statements made orally by counsel are proper material for consideration by a court deciding on a motion for summary judgment. "(Hiern v St. Paul-Mercury Indem. Co.,) CA 5th, 1959).

262 F 2d 526, 1 FR Serv. 2d 56c. 41 case 13). The lower court, we would rather think, had overlooked to consider such a view and fall into error.

Assuming for the matter of argument, that the administrative agency's evidence is "Overwhelming", (which we showed otherwise), or so it seems in the aura of the sensation of exaggeration, baseless assumptions of facts that were not, and loose speculations indulged in by its witnesses; the corruption, then, may be inquired into the circumstances surrounding the inception of the contest; why and how this particular piece of land has been singled out, from among the thousand acres filed on by Glen Allen for other persons and corporations; the apparent bias of the witnesses, whatever may be have prompted it; self interest in a hope or expectation of promotions; the impulse which actuated the arbitrary choice of the spots to sample, and the amount of sample taken; the readiness and learned garrulity of its witness to build up from a cereal bowlful of clay and sand, a tale of figures as tall as that of Paul Bunyan's; if there was corruption it was sealed in the lips of one dead whom we noticed to depose.

Whatever lies under the surface, we do not believe that this court can sanction proceedings, which under the record and the law, are unfair, arbitrary, capricious, or otherwise not in accordance with the law, so as to take from the appellant mine locators the fruits of a valid discovery and give it to another, who was greedier than discreet. Nor can we believe that this court can countenance an

unprincipled principle of governmental philosophy or behavior, which shall not be the rich and beautiful passages of the Constitution. If ever a decision is corrupt, it shall not be right.

The reviewing court should have granted summary judgment in favor of the appellants.

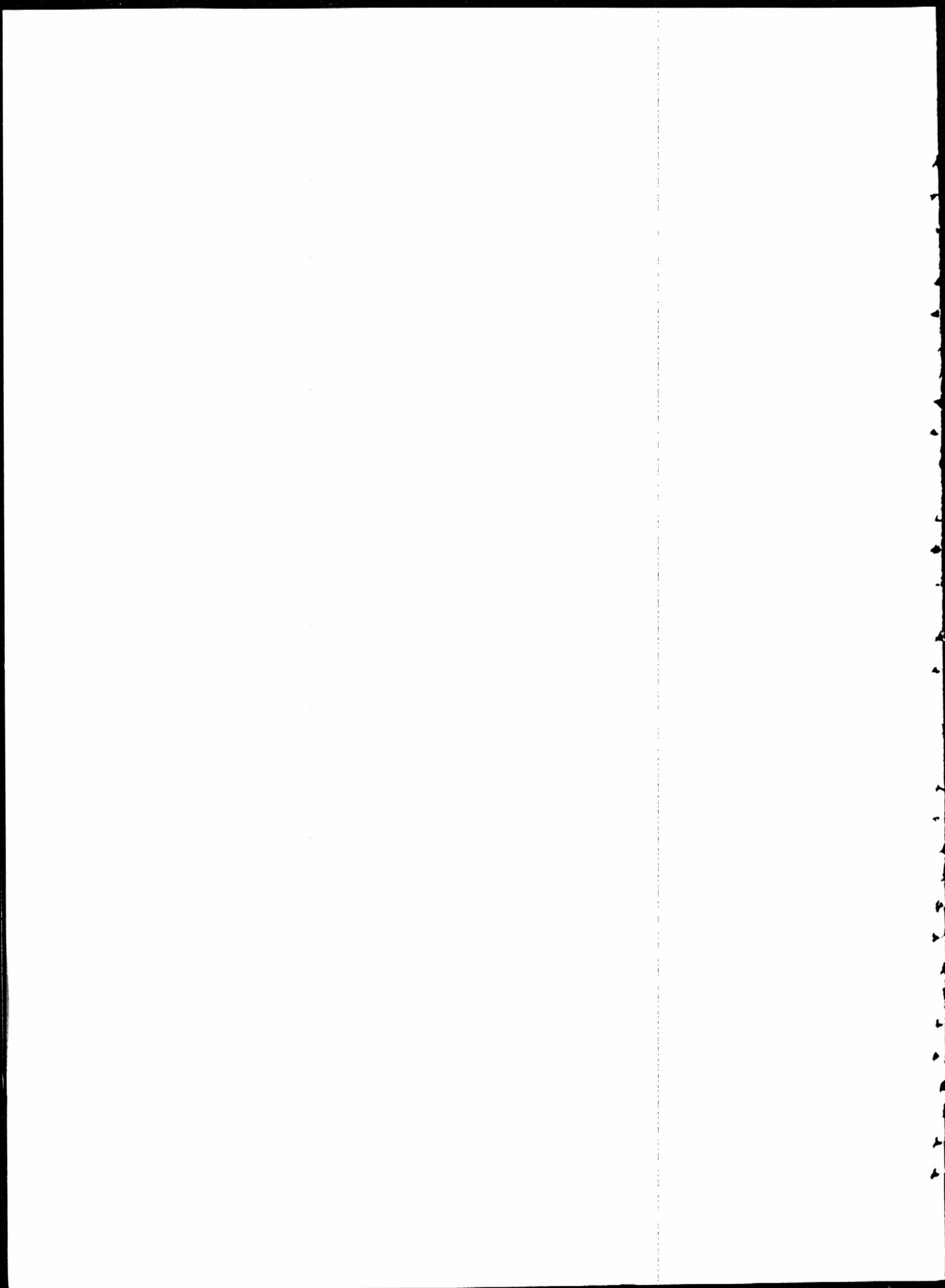
FOR THE ERRORS ASSIGNED, we respectfully submit that the judgment of the United States District Court should be reversed, and summary judgment be entered for appellants.

Respectfully submitted

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CONSOLIDATED BRIEF FOR ROY T. HELMANDOLLAR, ET AL.,
APPELLEES, CROSS-APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,625 and 18,680

BLAINE J. LORD, ET AL., APPELLANTS,
CROSS-APPELLEES

v.

ROY T. HELMANDOLLAR, ET AL., APPELLEES,
CROSS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 16 1964

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QUESTIONS PRESENTED

In regular proceedings, the Department of the Interior invalidated placer mining claim locations for lack of discovery of valuable minerals. The claimants instituted action in the district court to have the administrative decision reviewed. The district court entered judgment upholding the decision.

The questions presented are:

1. Whether the Department of the Interior's invalidation of placer mining claims for lack of discovery of valuable minerals is supported by substantial evidence and is not arbitrary or capricious.
2. Whether the district court exceeded its jurisdiction in vacating and re-entering its judgment 141 days after entry to permit an appeal.

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*/ Cases and authorities chiefly relied upon in this brief
are marked with an asterisk.

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UNITED STATES COURT OF APPEALS
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CONSOLIDATED BRIEF FOR ROY T. HELMANDOLLAR, ET AL.,
APPELLEES, CROSS-APPELLANTS

OPINION BELOW

The district court did not write an opinion. Its judgment granting the Secretary of the Interior's motion for summary judgment, denying the claimants' motion for summary judgment, and dismissing the complaint is printed at pages 74-
1/
75 of the Joint Appendix. Its order granting the claimants'

1/ For convenience, Blaine J. Lord and others, who were plaintiffs in the court below and who are appellants in No. 18,625 and cross-appellees in No. 18,680, will be referred to as "the claimants." Roy T. Helmandollar, manager of the Bureau of Land Management office in Arizona, and the Secretary of the Interior, who were defendants below and who are cross-appellants in No. 18,680 and appellees in No. 18,625, will be referred to as "the Secretary." Being a nonresident, Helmandollar was improperly joined and served. And while the Bureau of Land Management and the Department of the Interior were named defendants (Jt. App. 4), the suit proceeded as one against the Secretary. The Bureau and Department are not suable entities. See Chournos v. United States (C.A. 10, No. 7507, Aug. 28, 1964) not yet reported, and authorities cited there.

motion to vacate and re-enter that judgment is printed at pages 81-82 of the Joint Appendix.

JURISDICTION

These are appeals from the judgment of the district court which vacated and re-entered the prior final judgment (Jt. App. 74-75, 81-82, 90). The jurisdiction of the district court was asserted to be founded on Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. sec. 1009 (Jt. App. 2). The suit came before the district court on cross-motions for summary judgment (Jt. App. 33, 42). For reasons subsequently discussed, we believe the judgment became final leaving nothing for review by this Court.

STATEMENT

This suit was instituted by the claimants against the Secretary of the Interior and others to invalidate Department of the Interior decisions declaring null and void the claimants' locations of placer mining claims on federal public lands in Arizona (Jt. App. 2-31; App. A, B, C, pp. 20 - 35). The ground for the decisions was lack of "discovery" of valuable minerals.

The circumstances giving rise to the action and its development in the Department of the Interior may be summarized as follows: In a Bureau of Land Management contest proceeding, begun by the filing of a complaint in December, 1959, the United States challenged the validity of the claimants' mining claims. The Government alleged that no discovery of valuable minerals had been made, that the lands were nonmineral in character, and that the mining locations had not been made in good faith, i.e., that they had not been made for mining purposes.

After hearing, the examiner declared the claims null and void because a discovery of valuable minerals had not been made (App. A, p. 20). The Appeals Officer, Bureau of Land Management, and the Deputy Solicitor, in opinions of February 1961 and June 1962, respectively, affirmed the examiner's decision (App. B, C, pp. 28, 31).

In April 1963, the claimants filed a complaint in the court below (Jt. App. 2). Both the claimants and the Secretary filed motions for summary judgment (Jt. App. 33, 42).

The entire administrative record was filed with the district court. After the filing of memorandums and hearing of argument, judgment was entered on September 30, 1963, granting the Secretary's motion for summary judgment (Jt. App. 74-75).

On February 4, 1964, the claimants filed a motion "for an order to vacate and set aside" that judgment and "to re-enter said judgment or order, and to allow the plaintiffs to file a notice of appeal and to pursue an appeal * * *" (Jt. App. 75). The reason specified was "that plaintiffs and their Arizona attorney, of counsel, failed to receive the notice of the entry of judgment * * * by reason of inadvertence and excusable neglect occasioned by unusual circumstances * * *" (Jt. App. 75). Affidavits were offered that the office of the claimants' Washington, D. C., counsel had received the district court clerk's written notice of judgment "about the end of September, 1963," but the claimants' Washington counsel was out of the country during the months of August, September, and October 1963. Upon his return "he assumed a copy of the said judgment was mailed to" the claimants' Arizona counsel by the Secretary's counsel. The claimants' Arizona counsel, primarily

responsible for the prosecution of their case, stated he did not know of the judgment until late January 1964, when the time for appeal had expired and the Department of the Interior had served notice to the claimants in Arizona to clear the premises. (Jt. App. 76-79)

The district court, over the Secretary's objection, vacated the judgment and re-entered it on February 18, 1964 (Jt. App. 79, 81-82). Both the claimants and the Secretary filed a notice of appeal (Jt. App. 82, 90). This Court consolidated the cases "for all purposes" (Jt. App. 92). To avoid repetition, additional facts are stated in the Argument section of this brief.

STATUTES AND RULES INVOLVED

Revised Statutes sec. 2319, 30 U.S.C. sec. 22, provides:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law,

and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Revised Statutes sec. 2320, 30 U.S.C. sec. 23, is in part as follows:

Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * *

Revised Statutes sec. 2329, 30 U.S.C. sec. 35, is in part as follows:

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims. * * *

In pertinent part, 28 U.S.C. sec. 2107 provides:

* * * * *

In any such action, suit or proceeding in which the United States or any officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

* * * * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * * * *

Rule 73(a), F.R.Civ.P., in pertinent part provides:

In any action in which the United States or an officer or agency thereof is a party the time [within which an appeal may be taken] as to all parties shall be 60 days from such entry [of judgment] and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.

* * *

Rule 77(d), F.R.Civ.P., provides in part:

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail * * * upon every party affected thereby * * *. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules * *. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve

or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

STATEMENT OF POINT IN NO. 18,680

The district court erred and exceeded its jurisdiction in vacating and re-entering the prior final judgment of September 30, 1963, by judgment of February 18, 1964, to permit the claimants to appeal.

SUMMARY OF ARGUMENT

I

The district court's judgment for the Secretary of the Interior should be affirmed if this Court has jurisdiction to review it. The Department of the Interior's fact-finding, after fair and regular proceedings, that no valid discovery of valuable minerals had been made, is supported by substantial evidence on the record as a whole and is in accord with statutory and case authority.

II

The case should be dismissed for lack of jurisdiction. The district court vacated its original judgment and re-entered it without change solely to permit the claimants to appeal. This was done after the time for appeal had expired and in violation of applicable statutes and rules.

ARGUMENT

Since we believe that the district court was clearly correct in rejecting the claimants' attack upon the departmental ruling, we will first show why this is so. We also show in Point II the reasons why in our view the district court's judgment became final and not subject to review. We recognize that

this latter question is more arguable under the present state of the law.

I

THE DISTRICT COURT PROPERLY
GRANTED SUMMARY JUDGMENT
FOR THE SECRETARY OF THE
INTERIOR

It was stated in Castle v. Womble, 19 L.D. 455, 457 (1894), that "the requirement relating to discovery refers to present facts, and not to the probabilities of the future" and that:

where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *

"[T]he question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. * * *"Chrisman v. Miller, 197 U.S. 313, 322 (1905). The theory, test, and authority and procedure in the Department of the Interior, under the applicable statutes, R.S. secs. 2319, 2320, and 2329, 30 U.S.C. secs. 22, 23, and 35, supra, pp. 5 - 6, were discussed in Cameron v. United States, 252 U.S.

450, 459-461 (1920), the Supreme Court concluding (at 464): "Whether the tract * * * was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. [Citations omitted.] * * *" The Supreme Court recently confirmed these rulings in Boesche v. Udall, 373 U.S. 472, 476-477 (1963), and Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963).

This character of a discovery, definition of value, the applicable statutes, and the earlier authorities cited above were considered by this Court in Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959). This Court held that the burden of proving the existence of valuable minerals rests upon the location claimant, and stated (106 U.S.App.D.C. at 255-256, 271 F.2d at 838-839):

The statute says simply that the mineral deposit must be "valuable." Rev.Stat. § 2319, 30 U.S.C.A. § 22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in Castle v. Womble, 19 I.D. 455, 457 (1894) * * *.

* * * * *

Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weigh the evidence. * * *

This decision has been followed by the Ninth Circuit in the recent cases of Adams v. United States, 318 F.2d 861, 870 (C.A. 9, 1963); Mulkern v. Hammitt, 326 F.2d 896, 898 (C.A. 9, 1964); and Davis v. Nelson, 329 F.2d 840, 846 (1964).

Here, three mineral experts testified for the Government in the proceeding before the hearing examiner in March 1960. ^{2/}

2/ There is no merit to the claimants' argument that the hearing was "unfair" because they were not given sufficient time to prepare their case (Br. 43). The claims were located in July 1959, and amended notices correcting only the descriptions of three of the claims were filed in August 1959 (App. C, p. 32). Notice of the contest proceeding was served in December 1959 and the hearing was held in March 1960. The claimants' request for postponement for at least six months had been opposed by the State of Arizona as well as the United States and others. The hearing examiner left the record open for 20 days after the hearing for presentation of additional evidence (Tr. 292), which was presented and considered (App. B, pp. 29-30) and the claimants filed a brief. On the appeal to the Secretary, the Deputy Solicitor ruled (App. C, p. 34): "Nothing submitted on appeal and nothing in the record suggests that there is an equitable basis for reopening the hearing proceeding in this case." Sufficient time, we submit, was afforded the claimants.

Their testimony, supported by assay reports on, and other tests of, the sample material from the claims, was that the only mineral on the claims which might be valuable was magnetite and that it was not found on any of the claims in sufficient quantities to constitute a valid discovery (Jt. App. 101-116, 117-124; Tr. 155 et seq., 282). They concluded that no prudent man would invest in a magnetite mining operation of these claims because a net loss of about \$400,000 per acre would be suffered. Several witnesses for the claimants testified generally that they believed the claims contained sufficient minerals to mine at a profit (Jt. App. 126-142, 145-146, 156; Tr. 185-189, 207-208, 214). The only scientific evidence or test to support their testimony was reports of spectrographic examination of samples of materials from the claims (Jt. App. 148-149, 147, 150-152, 154; Tr. 282). These reports did not indicate with exactness the percentage of the minerals identified in the samples. It was undisputed that there had been no prospecting on the claims.

In the decision of August 1960, the hearing examiner declared the claims null and void because there had not been a discovery of minerals of such a character that a person of

ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success, in the development of the claims (App. A, pp. 20-27). The decision was affirmed on appeals in the Department of the Interior
3/
(App. B, C, pp. 28, 31). These decisions relied upon, and were pursuant to, the above authorities, and were not arbitrary or capricious. So holding the district court in the suit below seeking judicial review granted summary judgment for the Secretary.
4/

3/ The claimants suggest a denial of due process in that the Secretary was personally interested in the contest proceeding since he had professionally represented a grazing lessee of the lands on which their claims were located (Br. ⁴³; Jt. App. 25, 32). There is no valid basis for any suggestion of partiality. Stewart L. Udall was a Congressman at the time the contest proceedings were instituted in the Department of the Interior and also at the time the hearing examiner decided the case. Moreover, as usual, the final administrative decision was made by the Deputy Solicitor of the Department of the Interior, and not the Secretary personally. Merely stating that the Secretary had "vast opportunity to influence the course of any business matter processed through his office" and that "an official head of the administrative department will have ample opportunity to hide behind the system" is not an actual charge of impropriety (Br. ⁴⁷) and none was alleged which, if true, could be considered to support such a charge (Jt. App. 26-29). The claimants' position seems to be that no administrative proceedings could be had so long as Mr. Udall remained Secretary of the Interior. That position should be rejected.

4/ The facts are contrary to the claimants' assertions that the district court did not consider all the evidence or misconceived its function (Br. ²⁵ *et seq.*). At the hearing on the motions for summary judgment, the district judge stated that he had "reviewed the file" (Jt. App. 73). The judgment recited that the court "considered the material in support of both motions" (Jt. App. 74).

There is thus no substantive difference between the Foster case and this one. Since the administrative finding on the fact question is supported by substantial evidence on the record as a whole, since the evidence was conflicting, and since this Court does not reweigh evidence, the result should be the same. Asenap v. Huff, 114 U.S.App. D.C. 118, 119, 312 F.2d 358, 359 (1962); Morgan v. Udall, 113 U.S.App.D.C. 192, 194, 306 F.2d 799, 801 (1962), cert. den., 371 U.S. 941; Safarik v. Udall, 113 U.S.App.D.C. 68, 74, 304 F.2d 944, 950 (1962), cert. den., 371 U.S. 901.

II

THE DISTRICT COURT EXCEEDED ITS JURISDICTION
IN VACATING AND RE-ENTERING THE PRIOR FINAL
JUDGMENT TO PERMIT AN APPEAL AFTER THE TIME
FOR APPEAL HAD EXPIRED

It is settled that the time provision in 28 U.S.C. sec. 2107 and Rule 73(a), F.R.Civ.P., for the taking of an appeal from a district court judgment to a court of appeals is mandatory and jurisdictional. Slater v. Peyser, 91 U.S.App.D.C. 314, 315, 200 F.2d 360, 361 (1952), and the cases cited there; Shotkin v. Popenhager, 255 F.2d 100 (C.A. 5, 1958), cert. den.,

358 U.S. 855. The district court is powerless to extend the time for appeal except where there is a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree. But even then the extension may not exceed 30 days from the original time prescribed. Failure of the district court clerk to give notice of entry of judgment creates no exception. 28 U.S.C. sec. 2107; Rules 73(a) and 77(d), F.R.Civ.P., supra, pp. 6 - 7. "It is established that unless the appeal is taken within this period the Court of Appeals is without jurisdiction to entertain it and must dismiss it on its own motion, even though the failure to comply with the statutes is not otherwise brought to its attention.

^{5/}
[Citations omitted.]" Gunther v. E. I. Du Pont De Nemours & Co., 255 F.2d 710, 715 (C.A. 4, 1958). See also Raughley v. Pennsylvania Railroad Co., 230 F.2d 387, 389-390 (C.A. 3, 1956); Howard v. Local 74, Etc., 208 F.2d 930, 932-934 (C.A. 7, 1953); Watson v. Providence Washington Ins. Co., 201 F.2d 736, 737 (C.A. 4, 1953); Marten v. Hess, 176 F.2d 834, 835 (C.A. 6, 1949).

^{5/} Although this would indicate that we need not cross-appeal to present this issue, that action was taken out of caution because of the language in Tallman v. Udall, U.S.App.D.C. , 324 F.2d 411, 417-418 (1963), cert. granted, 376 U.S. 961, argued Oct. 22 and 26, 1964.

In F.T.C. v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952), the Supreme Court stated (at 211-212):

the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

The application of the facts of this case to the principles discussed show that the district court exceeded its jurisdiction and that this Court lacks jurisdiction. The district court entered judgment against the claimants on Monday, September 30, 1963 (Jt. App. 74-75). The district court clerk mailed notice of that judgment which the claimants admit was received by the office of their local counsel "about the end of September, 1963" (Jt. App. 79). Local counsel was later said to have been out of the country during the months of August,

6/

September and October 1963 (Jt. App. 78). Under 28 U.S.C. sec. 2107 and Rule 73(a), F.R.Civ.P., the time for appeal expired on Friday, November 29, 1963. The claimants' Arizona counsel deposed that he did not learn of the judgment until sometime late in January 1964 (Jt. App. 77). On February 4, 1964, the claimants filed a motion "for an order to vacate and set aside" the September 1963 judgment and "to re-enter said judgment or order and to allow the plaintiffs to file a Notice of Appeal and to pursue an appeal * * *" (Jt. App. 75).

6/ There was no indication that local counsel had made provision for the handling of his business during his absence. Neither the district court clerk nor government counsel was informed of his absence. No other local counsel was designated to represent the claimants. Nor was there indication of any request by Arizona counsel that local counsel, the district court clerk, or government counsel notify Arizona counsel upon entry of judgment.

Rule 4 of the Rules of the United States District Court for the District of Columbia requires that local Washington counsel be associated in actions instituted by counsel residing outside the District of Columbia. The reason for the rule, it seems clear, is to obviate the necessity for mailing notices to attorneys throughout the country and to require that an attorney who is a member of the Bar of the District of Columbia and who has an office here be available to receive all notices or services.

On February 18, 1964, the district court, over government objection, vacated the September 1963 judgment and re-entered it (Jt. App. 79, 81-82).^{7/} No request was made for a change of

7/ No "relief from judgment" was sought by the claimants under Rule 60(b), F.R.Civ.P., and the district court accorded no "relief from judgment." It re-entered the same judgment. Hill v. Hawes, 320 U.S. 520 (1944), relied upon by the claimants in the court below, is not applicable. It permitted a district court to vacate its judgment during term time and to re-enter the judgment, so as to permit a timely appeal, where the clerk had failed to give notice of the entry of judgment. The present case is different; the term of court has since lost its significance in this connection, Rule 6(c), F.R.Civ.P.; and "it is clear now that the doctrine of Hill v. Hawes has no vitality; and that no provision in Rule 60(b) should be construed to give relief from a final judgment for any of the reasons advanced in Hill v. Hawes." 6 Moore, Federal Practice (2d ed. 1953) sec. 60.03[8], p. 4028.

Three recent Supreme Court opinions can be distinguished. Wolfsohn v. Hankin, 376 U.S. 203 (1964); Thompson v. I.N.S., 375 U.S. 384 (1964); Harris Lines v. Cherry Meat Packers, 371 U.S. 215 (1962). In each, a divided Supreme Court reversed and directed the court of appeals to hear the appeal on its merits, under rules permitting relief from and review of judgments after the period for filing a notice of appeal. Here, there is no such "relief from judgment" but the same judgment. There is also no element of reliance on an act of the trial court or adversary at a time when a timely notice of appeal could have been filed, as in these cases. Further, the claimants' delay here (four months) in doing anything is substantial as compared with the delays in those cases (mere days). And there was not in those cases, as here, a violation of a purpose of a local rule requiring association of local counsel.

of any matter of substance, legal right, or obligation of the judgment. No correction of ambiguity was sought or made by the re-entered judgment. A possible 30-day extension, beyond the 60-day period for appeal "upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree" under 28 U.S.C. sec. 2107 and Rules 73(a) and 77(d), F.R.Civ.P., expired on Monday, December 30, 1963. The claimants' notice of appeal was not filed until March 9, 1964 (Jt. App. 82).

It is plain therefore that the district court's attempt to extend the time for appeal, by vacating and re-entering the same judgment 141 days after its original entry, was beyond its jurisdiction, and that this Court lacks jurisdiction and should dismiss the case.

CONCLUSION

This consolidated case should be dismissed for lack of jurisdiction. If it is not, the judgment of the district court should be affirmed on the merits.

Respectfully submitted,

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NOVEMBER 1964.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Office of the Hearing Examiner
305 Construction Center Building
4700 North Central Avenue
Phoenix, Arizona

August 24, 1960

DECISION

UNITED STATES OF AMERICA,	:	CONTEST NO. ARIZONA 10379
Contestant	:	Involving Canada Del Oro Placer,
v.	:	Casas Adobe Placer, Catalina
ARIZONA EXPLORATION COMPANY, et al.:	:	Foothills Estates Placer, and
Contestees	:	Suffolk Hills Placer Mining
STATE OF ARIZONA,	:	Claims, located in Pima County,
STANLEY C. SOEBO,	:	Arizona
A. G. JUNCO,	:	
Intervenors	:	

PLACER MINING CLAIMS HELD NULL AND VOID

The contestant filed its complaint in the above-entitled matter on December 15, 1959 alleging essentially as follows:

1. That no discovery of valuable minerals has been made on any of the above named claims;
2. That the land encompassed by these locations is non-mineral in character insofar as locatable minerals are concerned; and
3. That the mining locations were not made in good faith, were not located for mining purposes and are not being so used.

The contestees, in their answer, generally denied each of the foregoing allegations.

A hearing was held before the undersigned Examiner on March 16, 1960 at Tucson, Arizona. Otto Aho, Esq., Office of the Solicitor, United States Department of the Interior, Reno, Nevada, appeared in behalf of the contestant; Emojean Girard appeared in behalf of the contestants; George M. Skiles appeared in behalf of the State of Arizona; Stanley C. Schoe appeared in his own behalf; and Fred W. Fickett, Esq., appeared in behalf of Intervenor A. G. Jurko.

I

Luther S. Clemmer, after having been duly qualified as a mining engineer, testified that he examined the subject claims on October 6, 1959; on October 18, 1959 accompanied by Mr. Henry Ash and Mr. Glenn Allen; on February 17, 1960; and again approximately 2 weeks before the hearing. The claims lie approximately 14 miles north of Tucson, Arizona, in Section 19, T. 12 S., R. 3 E., G&SRM. The surface is generally flat. One large wash traverses the south side of the section. Geologically, the land is an alluvial valley fill, normal for the area, consisting of fine to coarse sands, some clay and some gravel which has been eroded from the nearby Tortolita and Santa Catalina mountains. There are present in this alluvium black sands referred to as heavy minerals. Four rudimentary roads, each approximately one-tenth of a mile in length, had been cleared. On the Casas Adobe claim, he found a 50 by 100-foot clearing on a little knoll and a well. He observed two trailers on the claims. Near the well were four concrete footings and a large Wilfley type table. He observed some small pits in the large wash. He took samples from the center of each of the claims on October 8, 1959. The samples were taken from holes about 1 foot in diameter and 15 to 18 inches deep. A composite sample was taken from the well drill cuttings on the Casas Adobe claim. One sample from each claim was tested by Mr. Clemmer and Mr. Henry Ash. Their tests showed that the alluvium contained .81 to 1.83% iron, valued at 20.8 to 47.6 cents per yard. One test showed .06% TiO_2 , .0025% zirconium, .0072 ounces of silver, and .0036 ounces of gold per ton. A sample was forwarded to the J. R. Simplot Company, of Boise, Idaho, for assaying. The quantitative report submitted by that company substantiated generally the results of the tests made by Mr. Clemmer and Mr. Ash. He estimated that all of the various minerals in the alluvium had a maximum theoretical assay value of 59.28¢ per yard. He estimated the mining and concentrating cost at 60¢ per yard. The cost of concentrating the concentrate into the various fractions he estimated at \$4.00 per ton of concentrate. He concluded that the operation would result in a ten cents per yard net loss. This estimate does not take into consideration development, plant, equipment, transportation and marketing costs.

A composite sample taken from the claims was submitted to LaMar Evans, of the Bureau of Mines, for testing.

LaMar G. Evans, extractive metallurgist and mineralogist, employed by the United States Bureau of Mines, testified that he tested two mineral samples, one weighing 102 pounds, and the other weighing 20.5 pounds, both delivered to him by Mr. Clemmer. The samples were tested for corundum or any other minerals of value. A microscopic examination of each of the samples fractionated by sink-float methods indicated to him that the samples did not contain corundum. The samples contained 1.10 to 1.25% magnetite, and less than 1% hornblende-chlorite, sphene (titanite), epidote, quartz-feldspars, ilmenite, muscovite, garnet, zircon, and pyrite.

Dr. Willard Carlton Lacey, professor of economic geology at the University of Arizona, stated that after receiving his Doctor's degree at Harvard University, he spent several years in the development of the Florida beach sands in the employ of the Titanium Alloy Company. During several years service with the Cerro de Pasco Corporation as petrologist and chief geologist, he made a complete study of the beach sands of the coast of Peru. He still serves as a consultant for the Cerro de Pasco Company. He examined the lands embraced by the subject mining claims about a week before the hearing. He observed thereon a large sign reading "A. E. C. Keep Off", a trailer, and a well. He walked over the area looking for evidence of sand concentrations in the washes and found none of consequence. He took a sample from the sediment that was derived from the well. This sediment had a higher concentration of sand than would actually be obtained by any mining operation. The sample was subjected to a sink-float separation process. He found that the original sand contained 1.2% magnetite and ilmenite, .03% cuprite, .15% limonite, .25% argentite, and .10% garnet, the latter occurring in small rounded crystals which are not considered to be of any commercial value. Commercial garnet is coarse garnet that has to be crushed into very angular particles so that it may serve as an abrasive epidote. He also found .15 hornblende, .05 sphene, and .01% zircon. He stated that the zircon, being only .01% of the total sand, had no value. He did not consider the ilmenite in the sample of any value. In his opinion the only mineral of any value found in the sample was the magnetite. The maximum recoverable value in magnetite that could be assigned to the sand on the basis of his studies was 20¢ per cubic yard. He estimated that the material on the claims could not be treated and separated for less than \$1.20 per ton or about \$1.40 per yard. It was his opinion that under optimum conditions and probable cost a mining operation on the subject claims would result in a loss of up to or over \$400,000 per acre, which no prudent man would undertake. He pointed out that the heavy mineral content of the sand on the subject claims is less than the heavy mineral content of the garnets which make up the largest percentage of the Catalina mountains.

Mr. Clemmer then testified that the salable minerals in the subject deposit had a theoretical gross value of 38.4 to 47.4 cents per cubic

yard. He stated that Mr. Allen had located placer mining claims embracing some 12,000 acres between July and October, 1959. He knew of no place in the United States where magnetite is mined from black sand as a source of iron.

Henry O. Ash, after having been duly qualified as a mining engineer, testified that he accompanied Mr. Clemmer in his examination of the subject mining claims. He confirmed the testimony of Mr. Clemmer with reference to the geological character of the area, the adequacy of the sampling procedures followed on the claims, and the assaying and testing of the samples that were taken. It was his opinion, based on the results of the sampling and testing of materials taken from the claims, that there were no deposits of valuable minerals thereon.

Glenn Allen, one of the contestants, testified that he has been engaged in mining and contracting for the past 11 years. Most of his work has been in connection with uranium, gold and copper in Southern Arizona. For the past 2 years he has been staking claims and testing and working with iron ore in Pima and Pinal Counties. He stated that he has probably staked about 1,000 claims for himself and other people. The largest deposit is located in Pinal County covering approximately 150 sections and containing mostly magnetite. He first examined the subject claims about a year and a half before the hearing while searching for magnetite or other valuable ore. He found magnetite and garnet exposed on the claims and subsequent tests revealed the presence of vanadium, titanium, zirconium and a few other valuable minerals. He stated that any mining operation would commence in the washes with a dredging or dry separation method being used. He had experience with dredging in New Mexico and was acquainted with other dredging operations in the United States. He estimated that dredging costs would be less than 30¢ a yard. A suction dredge could be operated at 10 to 15¢ per yard. He referred to a new prototype dry operation which would cost about 23 to 25¢ a yard. He stated that magnetite for use as a heavy media for a sink-float could be sold in Japan. It could be used in oil fields for drilling mud and in a new process for the production of steel. Magnetite would be suitable for ordinary iron processes if it were pelletized. The garnet could be used as abrasive and sold at 22¢ a pound. He stated that the eastern half of Section 19 has been leased to various individuals who subsequently entered into a partnership agreement relative to the development of the said section for mining purposes. A concentrating table has been set up on the claims. The well was drilled on the claims to produce sufficient water to justify a wet separation process. At present, the well will pump about 28 gallons a minute but it has the capacity to produce a lot more water. It was his plan to set up a pilot operation to prove the economic feasibility of mining and extracting valuable ores. He had excavations on the claims as deep as five feet and observed therein layers of black minerals as much as one-half inch thick.

On cross-examination, he stated that he had not had any formal educational training in geology, mining or engineering. The Wilfley concentration table on the claims had not yet been set up or used.

Blaine Lord, a well driller, testified that he drilled the well on the subject claims. He estimated that the well would pump 400 gallons a minute if an adequate pump were installed. Samples were taken about every 5 feet during the drilling of the well. The best concentration of black sand was at a depth of 250 feet.

Calvin Lord, a concrete contractor, testified that the garnet on the claims could be used in concrete topping to make a harder surface.

Emojean Girard, counsel for the contestants, described the manner in which samples were taken from the surface of each of the claims. The samples were subjected to qualitative spectrographic analyses which showed the presence of titanium, manganese, vanadium, barium, zirconium, and strontium.

On cross-examination, she stated that the samples were taken from a depth of not more than one foot.

Edward J. Kerber, who owns an interest in the subject claims, testified that he found a concentration of black sand containing magnetite, garnets and other minerals. It was his intention to find enough mineral to make a paying mine. Immediately prior to the hearing, a sample was taken from the claims by him, Glenn Allen and others.

James Concannon testified that he was engaged in the mining business, specifically with the separation of minerals by a gravity process without the use of water. He stated that approximately 25% of the material composing the sample which was referred to by Mr. Kerber consisted of black sands. Samples of concentrates which had been separated by a dry gravity process were introduced in evidence.

The contestant introduced in evidence copies of four leases wherein the Arizona Exploration Company leased all mineral and mining rights to three 20-acre parcels and one 40-acre parcel of the subject claims. The consideration therefor was \$100 per acre or \$2,000.00 for each 20-acre parcel. Each of these leases contains the proviso that "in the event of patenting of the lands leased, fee simple title is to be given" to the lessees "for the sum of \$50.00." Copies of two similar leases, in which Glenn Allen and Agnes Allen, husband and wife, were named as lessors, were also introduced in evidence by the contestant. All of these leases were executed during that period from August through December, 1959. The contestants introduced a copy of a partnership agreement for

the Glenn Allen Mining Company, dated January 15, 1960, in which five of the lessors named in the six leases referred to above are named as "limited" partners. The said partnership agreement provides generally for the exploration, development, mining and marketing of any and all minerals found on placer mining claims "to which each partner has a lease or in which each has some other interest."

II

Under the mining laws of the United States (30 U. S. C., 1952 ed., secs. 21, 22 and 35) only "valuable mineral deposits" may be located and the lands must be valuable for minerals. Discovery of a valuable mineral deposit must be made within the limits of each claim. A valid discovery, it has often been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine. Castle v. Womble, 19 L. D. 455 (1894); Chrisman v. Miller, 197 U. S. 313 (1905).

When adverse proceedings are brought against a mining claim the government has the burden of establishing a prima facie case that no valid discovery has been made. However, once a prima facie case is established by the government, the burden is then upon the claimant to prove a valid discovery. United States v. Jesse Edwards, A-28145 (January 20, 1960); Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959).

III

The contestant appears to rely principally upon the introduction of the leases entered into by the contestees to support its allegation hereinabove numbered "3" concerning the good faith of the locators. While the provisions of these leases pertaining to the disposition of lands embraced by the claims raise a considerable doubt as to the good faith of the locators, and their intent to use the lands for mining purposes, such doubt is not sufficient to establish, prima facie, the truth of the contestant's allegation. Nor does the fact that Glenn Allen located thousands of acres under the mining laws establish that these particular claims were not located in good faith. There is no evidence of any actual consequential use of the subject lands for purposes other than mining. It is concluded that the said allegation has not been sustained. Contestant's allegation number 3 is dismissed.

Minerals have been shown to be present in the alluvium exposed on the subject claims. The only question to be determined is whether or not those minerals, the most important of which is magnetite, are present in such quantity as to warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine.

The contestant's very well qualified expert witnesses conducted reasonable quantitative tests of samples taken from the claims and estimated the costs of recovery of the minerals by conventional methods. The results of these quantitative analyses show that the theoretical value of the recoverable minerals present is far exceeded by the costs of the recovery and marketing thereof. Thus, the contestant established, *prima facie*, that valuable minerals were not present on the claims in sufficient quantity to warrant a prudent man to invest his time and money in the hope of developing a paying mine.

To overcome the *prima facie* case established by the contestant, the contestants offered only qualitative spectrographic analyses showing that minerals were present on the claims. A spectrographic analysis has little or no value in the determination of the quantity of minerals present and the feasibility of the production thereof. The contestants have failed to show that the comprehensive quantitative analyses made by the contestant's witnesses were not reasonably accurate. The contestants offered testimony that the recovery costs would be lower than the contestant's estimates if a suction dredge, or a new prototype dry operation, were used. These estimates appear to be highly conjectural. I am persuaded that the costs of recovery by conventional methods estimated by the contestant's witnesses are reasonably accurate. The contestants have failed to overcome by a preponderance of the evidence the *prima facie* case established by the contestant.

It is concluded that the remaining allegations of the contestant's complaint have been sustained.

Lacking valid discoveries of valuable mineral deposits, the Canada Del Oro Placer, Casas Adobe Placer, Catalina Foothills Estates Placer, and Suffolk Hills Placer Mining Claims are hereby declared null and void.

This decision becomes final thirty days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. If an appeal is taken, there must be strict compliance with the regulations in 43 CFR, Part 221. See enclosed Form 4-1364.

If an appeal is taken by the contestants, then the adverse parties to be served are:

Mr. Otto Abo
Field Solicitor
U. S. Department of the Interior
1495 South Wells Avenue
Reno, Nevada

The Attorney General
State of Arizona
State Capitol
Phoenix, Arizona

Mr. Stanley C. Soho
P. O. Box 4894
Tucson, Arizona

Mr. Fred W. Fickett
Fickett & Dunipace
Attorneys at Law
P. O. Box 2568
Tucson, Arizona

If an appeal is taken by the contestees, the amount of the filing fee will be computed on the basis of \$5.00 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision, the total filing fee is \$20.00.

Rudolph M. Steiner

Rudolph M. Steiner
Hearing Examiner

Enclosure

Distribution:

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Mr. William M. Hazel (Certified Mail)
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Standard Distribution List

In reply refer to:

APPENDIX B

Arizona Contest No. 10379
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 17, 1961

Certified Mail
Return Receipt Requested

DECISION

United States,	:
Contestant.	:
v.	:
Arizona Exploration Company,	:
Glenn Allen, Agnes Allen,	:
Shirley Ann Allen, Nancy Lee Allen,	:
William M. Hazel, Joseph Allen Hazel,	:
Joseph Evan Hazel, and Elizabeth	:
Hazel Kendall,	:
Contestees.	:
	:
State of Arizona,	:
Stanley C. Soho and	:
A. G. Jurko,	:
Intervenors.	:

Canada Del Oro, Casas Adobe,
Catalina Foothills Estates and
Suffolk Hills Placer Mining
Claims covering section 19,
T. 12 S., R. 13 E., G.S.R.
Meridian, Pima County, Arizona.

Decision Affirmed

This is an appeal from a decision of the Hearing Examiner, dated August 24, 1960, declaring the above identified mining claims null and void. The decision was premised on the finding that each claim lacked a valid mineral discovery within the meaning of the mining laws.

The subject mining claims were originally located as association placers in July 1959. The locations conflicted in part or in whole with selections made by the State of Arizona, a public sale application of Mr. Soho and a grazing lease of Mr. Jurko. The contest was initiated by the Bureau of Land Management by a complaint filed December 15, 1959. The complaint charged that there was no discovery within the limits of any of the claims, that the land covered by the locations, so far as locatable minerals are concerned, is non-mineral in character and that the claims were not located in good faith.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. 30 U.S.C. secs. 22, 23, 35. The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success,

in developing a valuable mine. Castle v. Womble, 1, L.D. 455 (1894). Further, although the Department requires the Government, as the party advancing the challenge to the validity of a mining claim, to establish a *prima facie* case, the mining claimants are required to sustain the burden of showing by a preponderance of the evidence that there has been compliance with the applicable mining law and that the claim has been validated by discovery. Foster v. Seaton, 271 F. 2d 836 (D. C. Circuit, 1959).

The evidence was extensively summarized in the decision below. It is enough to point out that qualified Government mineral examiners examined the claims, took samples therefrom for assay purposes, familiarized themselves with the geology of the area and the costs of mining. They were of the opinion that the values disclosed within the claims did not satisfy the accepted test for discovery under the mining laws. Dr. Lacey, professor of economic geology at the University of Arizona, examined the claims and had assays of the materials taken therefrom. Those assays showed the presence in minor amounts or traces of iron (magnetite) titanium, zirconium and other metals. Without considering transportation costs to market he stated that "the cost to extract it on the basis of my estimates, including a wasting cost for the clay, would come up somewhere in the vicinity of \$466,000 per acre, so my calculations on the operation in section 19 would be that they would end up with a net estimated loss of \$406,000 per acre." TR 89.

To overcome this evidence, the contestants offered first the testimony of Mr. Glenn Allen. He stated that he earned his livelihood by reason of - "Oh, I stake claims for other people. * * * I just did the staking for them." He indicated that "They did the actual prospecting", and that he had located over 12,000 acres in the previous two years. TR 199-201. He stated that he found out where the concentration of material (magnetite for which he indicated the claims were located) by running a magnet through the ground to pick up the magnetite. TR 202. He stated that a prudent man would not be justified in expending monies on these properties without further prospecting and without more samples. TR 208. His further testimony consisted of mere recitations of hope and belief that machinery could be procured that would make separation of mineral from the other earths economically feasible. Other witnesses testified as to their knowledge of the mere existence of minerals within the limits of the claims and the hopes that sufficient mineral could be found to make a paying mine. Mr. Kerber expressed the opinion that "There are enough of the black sands to make it worthwhile, it seems to me, after further exploration you can find, probably, find plenty of it." TR 261 (emphasis added).

Mr. William Hazel, one of the contestants, was not represented by counsel at the hearing but, the record being kept open for his deposition, a

statement submitted by him may be considered. That statement, dated April 3, 1960, so far as is pertinent to issues involved, relates that his interest as a locator in the claims was for the alumina oxide garnets that may be contained therein. He stated that he was making inquiry into the possible uses and marketability of that material. This, similarly as the testimony of Mr. Allen and Mr. Kerber, demonstrates not a discovery, but merely inquiry into the possible value of the minerals in the event minerals in sufficient quantity and quality were to be found within the limits of the claim after further prospecting.

The appellants, on appeal to this office, asserted that the decision of the hearing examiner was based on a misinterpretation and application of law. However, as shown above, the appellants were unsuccessful in their attempts to establish discoveries on the several mining claims involved, not because of error of law on the part of the hearing officer, but rather because of their inability to overcome the evidence submitted by the Government. The findings of fact of the examiner are fully supported by reliable, probative and substantial evidence presented at the hearing and his conclusions that the claims are null and void for want of discovery are fully supported by the record.

The decision declaring null and void the Canada Del Oro, Casas Adobe, Catalina Foothills Estates and Suffolk Hills Placer Mining Claims, is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of \$5 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is \$20.00. In taking an appeal there must be strict compliance with the regulations.

J. H. Tunn
Appeals Officer

Enclosure

DISTRIBUTION:

Mrs. Emojean K. Girard, Attorney at Law (Certified Mail)
Field Solicitor, U.S. Department of the Interior (Regular Mail)
Mr. William M. Hazel (Regular Mail)
Mr. Wade Church, Attorney General (Regular Mail)
Mr. Stanley C. Soho (Regular Mail)
Mr. Fred W. Fickett, Attorneys at Law (Regular Mail)
Hearing Examiner, Rudolph H. Steiner
Hearings Administrative Officer
Lands Staff Officer (3)
Minerals Staff Officer (5)
AA-2; SS(Arizona); LO(Phoenix); Case File; Permanent File; Director's Reading File; Attorney's Reading File; AO Reading File; BF

APPENDIX C

UNITED STATES

v.

ARIZONA EXPLORATION COMPANY ET AL.

A-28876 Decided JUN 22 1962

Mining Claims: Determination of Validity--Mining
Claims: Discovery

A decision declaring mining claims null and void for lack of discovery is proper where evidence at a hearing supports the conclusion that there has not been a discovery of minerals of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in the development of the claims.

Mining Claims: Hearings--Administrative Procedure
Act: Hearings

A request to produce new evidence which would require reopening a hearing proceeding in a contest against mining claims will be denied where there is no substantial equitable basis for granting the request.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

A-28876

United States : Mineral contest
v. : Arizona 10379
Arizona Exploration Company^{1/} : Mining claims declared
: null and void
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Arizona Exploration Company and the individuals listed in footnote 1 have appealed to the Secretary of the Interior from a decision by the Appeals Officer, Bureau of Land Management, which affirmed a hearing examiner's decision declaring null and void four placer mining claims located in Pima County, Arizona, about 14 miles north of Tucson. The claims are known as the Canada Del Oro, Casas Adobe, Catalina Foothills Estates, and Suffolk Hills placers and each covers one of the four quarters of section 19, T. 12 S., R. 13 E., G. & S. R. Meridian. The claims were located on July 20, 1959, and amended notices correcting the descriptions of three of the claims were filed on August 31, 1959.

By contest notice dated December 15, 1959, the United States contested the validity of the claims charging that no discovery of valuable minerals has been made on any of the claims, that the land covered by the claims is nonmineral in character insofar as locatable minerals are concerned, and that the mining locations were not made in good faith, were not located for mining purposes and are not being so used.

1/ Individual contestants are: Glenn Allen, Agnes Allen, Shirley Ann Allen, Nancy Lee Allen, William M. Hazel, Joseph Allen Hazel, Joseph Evan Hazel, and Elizabeth Hazel Kendall.

The State of Arizona, Stanley C. Soho, and A. G. Jurko were intervenors at the hearing.

At the hearing on the charges, held on March 16 and 17, 1960, qualified mineral examiners testified for the Government that they examined the claims and took samples of material therefrom. Their testimony, supported by assay reports on and other tests of the material from the claims, was that the only mineral which might be valuable on the claims was magnetite and that it was not found on any of the claims in sufficient quantities to constitute a valid discovery. A professor of economic geology from the University of Arizona corroborated the testimony of the Government mineral examiners as to the value of the magnetite on the claims, estimated that the cost of extracting the magnetite would amount to a net loss of at least \$406,000 per acre, and testified that no prudent man would invest in any operation where he would lose up to or over \$400,000 per acre.

Contestee Glenn Allen, who is president of the appellant company, and several witnesses for the appellants testified generally that they believed that the claims contain sufficient mineral to mine at a profit. The testimony was not supported by objective evidence or tests other than reports of spectrographic examination of samples of material from the claims, which reports did not purport to indicate with exactness the percentage present on the claims of the minerals identified in these samples. Undisputed testimony at the hearing indicated that there had been no prospecting on the claims.

In a decision of August 24, 1960, the examiner held that the Government established, prima facie, that valuable minerals were not present on the claims in sufficient quantity to warrant a prudent man's investing his time and money in the hope of developing a paying mine, and that the contestants failed to overcome the Government's prima facie case. The examiner, accordingly, declared the claims null and void because a discovery of valuable mineral deposits had not been made. Chrisman v. Miller, 197 U. S. 313 (1905).

Objection is taken on appeal to the use of the profitability test in determining whether a valid discovery of minerals has been made. The objection is without merit inasmuch as both the examiner and the Appeals Officer used the prudent man test and not the test of profitability in determining whether a discovery had been made on these claims. That is, both decisions held, in effect, that minerals were not found within the limits of these claims of such a character that a person of ordinary prudence would be justified in the further

expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Chrisman v. Miller, supra.^{2/}

The appeal concludes with an affidavit and motion for leave to produce additional evidence. In support of the motion, the appeal asserts that insufficient time was allowed to the appellants in which to prepare properly for the hearing and that the appellants have discovered new evidence not in existence at the time of the hearing, which evidence would tend to prove the existence of valuable minerals on these claims, the production and sale of some of these minerals in local markets, and the fact that the cost of extracting the mineral is not as high as stated by Government witnesses.

If the motion to produce additional evidence not in existence at the time of the hearing were granted, further hearing before an examiner at which all parties were represented would be required. See 43 CFR, 1960 Supp., 221.77; United States v. Keith V. O'Leary, et al., 63 I. D. 341 (1956). Such action is not taken in the absence of a substantial claim to equitable consideration on the part of the petitioners. J. C. Nelson, et al., 64 I. D. 103, 110 (1957). Nothing submitted on appeal and nothing in the record suggests that there is an equitable basis for reopening the hearing proceeding in this case.

The appellants were served with copies of the complaint in the latter part of December 1959. Their lack of readiness to prove the validity of their claims by showing a discovery of valuable minerals approximately two and one-half months after they were served with notice of the contest and almost eight months after the claims were located is not a convincing or reasonable basis either for postponing or for reopening the hearing proceeding in this case. A mining claimant presumably has made a valid discovery of minerals at the time he locates his claim, and if he has not, he is not entitled to possession of the land as against the United States.

^{2/} The reference to Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959), in both the examiner's and the Appeals Officer's decisions was as authority for the point that the contestants had the burden of overcoming the evidence presented by the Government that the claims were invalid for lack of discovery.

A-28876

Cameron v. United States, 252 U. S. 450, 456 (1920); United States v. Carlile, 67 I. D. 417 (1960). If the claims here involved were valid when located in July 1959, and the appellants believe that they were, then the requirement of this contest, that the appellants demonstrate that a discovery of valuable minerals had been made by March 16, 1960, does not seem unfair or improper. In the circumstances, I conclude that the time allowed the contestees for preparing for the hearing was not so short as to interfere with a proper defense against the contest. Since the assertion of insufficient time to prepare for hearing does not provide an equitable basis for reopening the hearing in this case, and the record discloses no basis for allowing the request to present new evidence, the request is denied.

After a careful review of this record, I conclude that the decision by the Appeals Officer, Bureau of Land Management, declaring the claims null and void was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Appeals Officer, Bureau of Land Management, is affirmed.

Edward W. Piske
DEPUTY SOLICITOR

REPLY AND ANSWERING BRIEF FOR APPELLANTS,
CROSS-APPELLEES, BLAINE J. LORD, ET AL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,625 and 18,680

BLAINE J. LORD, EDYTHE M. KERBER, ET AL.,
APPELLANTS, CROSS-APPELLEES,
VS.
ROY T. HELMANDOLLAR, ETC., ET AL.,
APPELLEES, CROSS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOPEZ & SESE
610 Central Building
Washington, D.C.

United States Court of Appeals
for the District of Columbia Circuit

JOSE DEL CASTILLO
99 South Church Avenue
Tucson, Arizona

FILED DEC 17 1964

Nathan J. Paulson
CLERK

Counsel for Appellants,
Cross-Appellees

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,625 and 18,680

BLAINE J. LORD
EDYTHE M. KERBER, et al.,

Appellants,
Cross-Appellees

vs.

ROY T. HELMANDOLLAR, etc., et al.,

Appellees,
Cross-Appellants

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY AND ANSWERING BRIEF FOR BLAINE J. LORD, ET AL.,

APPELLANTS, CROSS-APPELLEES

Reply to contested Issue Of Lack Of Substantial Evidence
To Support Decision

In this appellants' reply brief, we shall be short and concise, since the position taken by appellees in their brief has made it possible to cut right down to the core of the contested issues.

The various citations compiled by appellees to bolster the ram-shackle structure of their argument, boiled down, amount to this: That "there is thus no substantive difference between the Foster case (Foster v. Seaton, 106 U.U. App. D.C. 253, 271 F2d 836 (1959) and this one" at bar, (Appellees' Br., p. 14), and they urge that the result shall be the

same.

We wholly disagree. Such sweeping claim is incorrect. A world of substantive difference exist between the case at bar and the Foster v. Seaton case. Such substantive difference, set forth in comparative columns, is as follows:

FOSTER v. SEATON case

1. Subject minerals: common gravel and sand.
2. No evidence of prospective market value, and factors of accessibility to market present demand, required in such gravel and sand "mineral".
3. Land not mineralized, except for gravel and sand.
4. Conflicting evidence.
5. Claimants contend that Government overcome the claimants' evidence.

THE CASE AT BAR

1. Subject minerals: metallic minerals of magnetite (form of iron), zircon, titanium, others inherently valuable.
2. Proof of commercial value not required; notwithstanding, Government own witnesses showed minable value of minerals; so did appellants' witnesses.
3. Land is mineralized, with black metallic minerals and other metals with actual or potential values, according to record.
4. No conflicting evidence, since the Clemmer-Ash proof introduced by the Government, to which claimants were in agreement, has been available to claimants; and Dr. Lacey's evidence is incompetent mineral content in a single claim, not to say in the four claims.
5. Claimants showed by preponderance of evidence that land is mineralized, -so found by examiner, presenting samples and tests and assays of their own and making use of Government's own evidence. Further, claimants showed that Government no proof, substantial or otherwise, to support its decisions.

6. No claim of fraud or imposition, nor claim of unfair, not impartial hearing or denial of opportunity to present all defenses.
6. Alleged and showed that because of manifest personal and professional interest of Secretary of Interior, himself, from inception of contest, claimants were deprived of fair and impartial hearing and opportunity to present all defenses, and were required to prove matters not required by law.
Even if decision were corrupt, claimed the Government, it is still right.
7. No substantial evidence, if any proof at all, to support agency's and Secretary's decision, in the record as a whole, according to law.

We respectfully submit that the case at bar shall be determined according to the whole record of the case, the law applicable on matters raised therein, and that, had the lower court considered the whole record as required by law, and not merely justifying the administrative decision, and, in this case, with competent evidence, summary judgment should have been denied the Government, and, instead, appellants should have been granted summary judgment against the appellees.

It seems, that the appellees, in their contention that the administrative decision is supported by substantial evidence, still cling to Dr. Lacey's speculative statement that mining operation on the subject land would result in a net loss of about \$400,000.00 per acre, based upon a 2 1/2 pounds of dirt (about a cereal-bowlful) he scooped out of well diggings in one spot in one of the four claims comprising a section of land to prove mineralization or the lack of it within the four subject claims. The crux of the appellees' claim,

then, to any evidence to support the administrative decision depends on whether Dr. Lacey's sample of 2 1/2 pounds of dirt which he scooped out of diggings of a well dug in one spot within one mining claim of placers is competent to prove the amount of minerals, not only within one claim, but also within the three other placer mining claims of one quarter section each, from which he did not bother to get a sample. If common sense and the physical facts could not render such proof incompetent, the law will: under the mining laws of the United States discovery of a valuable mineral deposit must be made within the limits of each claim. Likewise, to show no valuable minerals in four claims, samples and tests of them shall necessarily be taken from within each claim. In appellants' argument on this point, in our opening brief, we cited a case in which it has been held that a single sample from one claim has been held not to indicate a discovery of a large quantity of low-grade ore. (Appellants Br. p. 30). By the same token, a single sample from a spot in one claim of placer containing low-grade ore does not indicate the non-existence of minable low-grade ore, which, in this case, in Arizona, low-grade ore is being mined profitably.

Appellees' argument rests solely on the evidence given by Dr. Lacey, based on his 2 1/2 pounds sample from one point in one claim. If such evidence is found to be incompetent to indicate the quantity of minerals in three other mining claims, appellees' case must, therefore, fail.

Answer To Cross-appellants'
Second Contested Issue

First of all, before going to the discussion of applicable principles and the cases, we must challenge the cross-appellants' statement in their Statement of the facts at page 4, their brief, to wit: "Affidavits were offered that the office of the claimants' Washington, D.C. counsel had received the district court clerk's written notice of judgment 'about the end of September, 1963"'; and on page 16, same brief, as follows: "The district court clerk mailed notice of that judgment which the claimants admit was received by the office of their local counsel 'about the end of September, 1963' (Jt. App. 79)." Such statements are incorrect and not true. In Joint Appendix, page 79, the part of the affidavits referred to, does not say anything about the Washington, D.C. counsel's receipt of "the district court clerk's written notice of judgment", nor of any receipt of "the district court clerk mailed notice".

The statement contained in said affidavit is as follows: "That about the end of September, 1963, a copy of the Judgment in the above-entitled cause was received by his office during his absence;" (underlining supplied) (JA 79). This "copy of the Judgment", which was the only paper ever received by the office of claimants' local or Washington, D.C. counsel's office, was the form of judgment prepared by the Government counsel for the lower court's judge's signature. The district court clerk did not mail such notice or a notice to claimants counsel either to Washington, D.C. or to Arizona, and there is no record of mailing such notice to claimants.

Rather, it seems to be the practice of the district court clerk, observed

and evident to this Arizona counsel for the claimants', that when a motion is granted or/and an order made, the clerk would send a card to the party whose motion is granted or who was to prepare the written order notifying such party or his counsel of the granting of his motion and requesting him to prepare the written order thereof. The counsel then prepares the written order, and in this instant case, mailed a copy of said order or Judgment to the office of the local counsel. The local counsel, in this case, however, was out of the country during August, September and October, 1963. (JA 78).

Let us, further, get the facts straight, to wit:

(1) It is undisputed, and cross-appellants admit that "claimants' Arizona counsel, primarily responsible for the prosecution of their case" is an actual fact. (Appellees' Br. p. 4). Appellees knew this of their own personal knowledge, from the inception of this case.

(2) That at the hearing of the motion for summary judgment, it was only the Arizona counsel, the attorney actually handling the case, personally appeared and argued the case in the district court, on September 11, 1963. (JA 57-73). Appellees' counsel knew it, personally, the district court judge knew it, the Clerk knew it, the court reporter had made a record of it. Under the circumstances, it is natural and logical, and it goes without saying, that the Arizona counsel should have notice or should have been notified as to the outcome of the matter he personally appeared in and argued.

(3) As stated above, the clerk did not send a notice of the granting of the Government's motion for summary judgment, either to the local counsel or to the Arizona counsel for the claimants. No notice of the entry of judgment was

sent to claimants' counsel. The appellees' counsel was sent a notice by the clerk and a request to prepare the written order. This the appellees' counsel did, and although mailed a copy to the office of appellants' Washington, D.C. counsel, did not serve a copy upon the Arizona counsel, whom they knew was personally handling the case and primarily responsible in prosecuting it, whom they personally knew was personally present by himself at said hearing and personally argued with the said Government counsel.

Such facts being so, under the circumstances, it was natural and logical for the Washington, D.C. counsel to assume, as he so stated, that a copy of the Judgment was mailed to the Arizona counsel, especially when said local counsel was out of the country and did not know what transpired during the period of his absence and especially when he had not appeared at all at said hearing. The Arizona counsel, who personally argued the case, and primarily responsible in prosecuting it, did not know nor learned of the decision or the judgment in any form until sometime in January, 1964. (JA 77; Appellees' Br. p. 5).

The lower court has knowledge of the facts, and of the circumstances, or in privy with them, as the case may be, when the appellants filed and submitted their motion for an order to set aside the order or judgment of September 30, 1963, and to re-enter it. In any case, it is presumed that it has knowledge of the facts and circumstances described above, when the court considered appellants' motion and granted it, set aside the said order or judgment and re-entered it. The lower court had jurisdiction, and the discretion to do so. The appellees filed an objection and opposing memorandum and

had their say. The lower court was the trier of the facts on the matter, and is presumed to have found sufficient and good reasons upon which to exercise its discretion.

To have allowed the appellees take advantage of the circumstance in which, a party may go through the form of serving a copy of the written order or judgment on a local counsel (used for signing motions to satisfy local practice rules) and failing to serve a copy of such important document upon the Arizona (or foreign jurisdiction) counsel, whom appellees' counsel actually and personally knew to be primarily responsible in the prosecution of the case and against whom they argued the matter involved in such order or judgment, --to have allowed such party to hide behind certain rules of procedure which are open to arguments, the court would have opened the door to mischief, and would have ignored plain, elemental justice. The lower court, we submit, properly exercised its discretion in setting aside the said order or judgment and in re-entering it.

The grounds, upon which appellants' motion for an order to set aside said order or judgment was based, were failure to be served the notice of an order or judgment under Rule 77(d), Federal Rules of Civil Procedure, and because of inadvertence and excusable neglect occasioned by unusual circumstance and the confusing fact that the attorney concerned and who argued the case before the court, expecting to be serve with the judgment or notice of its entry, was not served. (JA 75-78).

Quoting the Committee on Amendment of Federal Rules of Civil Procedure, Moore's Federal Practice stated:

"In Hill v. Hawes (1944) 320 US 520 originating in the District of Columbia, when only twenty days from the entry of judgment was the period allowed for taking an appeal and the clerk failed to send this formal notice, the district judge relieved the party by vacating the judgment and reentering it, so that the time started anew from the reentry. This action was sustained by the Supreme Court. At a time when the court lost jurisdiction of the cause at the expiration of a term, the holding in Hill v. Hawes would have caused no difficulty, but since Rule 6 of these Rules abolishes the old doctrine that the expiration of a term ends the court's jurisdiction, the effect of the decision in Hill v. Hawes seemed to be that at any time, even long after the entry of judgment, the court might vacate it for the purpose reentering it and thus reviving the right of appeal. x x x" Moore's Federal Practice, 2d Edition, Rules and Official Forms as Amended 1961, R 73(3) pages 894-895.

The respondent in said Hill v. Hawes case contended that the vacation of the judgment and re-entry of a new judgment amounted to an attempted extension of the time for appeal; that the clerk's neglect to comply with Rule 77(d) does not affect the validity or finality of the judgment, and that the notice of appeal was consequently out of time and the court below properly dismissed the appeal on that ground. To which the Supreme Court says: "We cannot agree." Adn further says and held, as follows:

"It is true that Rule 77(d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60(a) (b).) These rules do not in terms apply to the situation here present, as the court below held. But we think it was competent for the trial judge, in the

view that the petitioner relied upon the provisions of Rule 77(d) with respect to notice, and in the exercise of a sound discretion, to vacate the former judgment and to reenter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within control of the trial judge for such action as was in the interest of justice to a party to the cause.

CONCLUSION

Under the facts and circumstances, we feel that the lower court properly exercised its jurisdiction in setting aside the order or judgment entered on September 30, 1963, and re-entering a new judgment, and that the Court herein has jurisdiction to hear and determine this appeal filed immediately after the re-entry of judgment, to prevent grave injustice to appellants. On the issue of whether the administrative decisions is supported by substantial evidence, we have shown definitely that the lower reviewing court committed error, in a detailed discussion in our opening brief, and that, if Dr. Lacey's evidence is not competent because of such most inadequate sampling and testing of material from one spot in one claim to prove mineralization values in three other claims from which he did not get a sample, then, the appellees completely failed in their proof.

Relief is prayed in accordance with the prayer of our original opening brief.

Respectfully submitted,

LOPEZ & SESE
610 Central Building, Washington, D.C.
JOSE DEL CASTILLO, Tucson, Arizona
Counsel for Appellants, Cross-appellees

By Jose del Castillo

LeRoux
-LeRoux
July 1965

FILED JULY 19 1965

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

for the District of Columbia Circuit
United States Court of Appeals

BLAINE J. LORD	:	
EDYTHE M. KERBER, et al.	:	
Appellants,	:	
Cross-Appellees,	:	Case No. 18,625
vs.	:	
ROY T. HELMANDOLLAR, etc.	:	Case No. 18,680
BUREAU OF LAND MANAGEMENT,	:	
SECRETARY OF THE INTERIOR STEWART	:	
L. UDALL.	:	
Appellees,	:	
Cross-Appellants	:	

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS,

For The District of Columbia Circuit:

BLAINE J. LORD, EDYTHE M. KERBER, et al., Appellants and Cross-Appellees, above-named, present this, their petition for a rehearing in the above-entitled cause, and in support thereof, respectfully shows:

I

The Court in its opinion, per curiam, dismissing Appellants' appeal failed to consider essential facts in the record, which, under the United States Supreme Court's decisions in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962),

Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964), and Wolfson v. Hankin, 376 U.S. 203 (1964), would have pointed to a different result and the cause of the Appellants would have been determined on its merits. From the record, said facts are as follows:

On February 4, 1964, directly on learning through the defendants-Appellees' "clear out" ^{order} from the property in question of an entry of judgment adverse to plaintiffs-Appellants, Appellants filed a motion (Joint Appendix, pp. 77 - 78) For Order To Vacate And Re-enter Judgment Or Order in pertinent part, to wit:

For an order

"to vacate and set aside the judgment or order granting summary judgment in favor of defendants and against the plaintiffs in this action, * * *

"and to re-enter said judgment or order,

"and to allow the plaintiffs to file a Notice of Appeal and to pursue an appeal,"

The stated grounds for the motion are, to wit:

"on such terms as may be just, on the ground that plaintiffs and their Arizona attorney, of counsel, failed to receive the notice of the entry of judgment and of the judgment or order itself by reason of inadvertence and excusable neglect occasioned by unusual circumstances and the confusing fact that the attorney actually concerned and who argued the case before the Court had expected that he may be served with the judgment or notice of entry of judgment, and that he believed that when such judgment or notice of entry thereof shall be served, the local attorney would be present in the country and Washington, D.C. That under the circumstances, it shall be in the interest of justice to allow the plaintiffs to pursue an appeal."

The motion was supported by affidavits of the Trial counsel and of the local counsel. In the affidavit of trial counsel, Jose del Castillo, he brought to the district court's attention the fact that, as follows: "but that, on computing the time which has passed since the entry of the judgment or order, the period within which

an appeal may be made has lapsed".

Let it be remembered that the same judge, Hon. Edward J. Tamm, who presided at the litigation of the case in the district court, was presented the motion to vacate and set aside the said judgment and to re-enter it. He was familiar with the facts and the circumstances concerning it, the minutes made and the orders.

The motion presented to him was not designated under any specific rule. It sought three things. Having presided over the case, he must be aware of the time lapse between proceedings and orders, with the records to aid him. Having been reminded further by the affidavit supporting the motion, he should know that the movant plaintiffs could not timely appeal and that the maximum time possible for initiating an appeal, that is to say, within the 90-day period (including the 30-day allowed by Rule 73), had passed. He could not have jurisdiction to extend the time for appeal under Rule 73(a), and he did not. The motion had not tied him to any specified rule of procedure. It asked for an order to vacate and set aside the judgment, on grounds based on facts and circumstances that fitted more aptly to the requirements prescribed in Rule 60(b) than to any other rule. Within this rule, the motion should have been made within a reasonable time and for "reasons (1), (2) and (3) not more than one year after the judgment, or order, or proceeding was entered or taken". It was logical for the court then to treat the motion as a motion under Rule 60(b), where the exercise of its discretion are strengthened by the authority provided therein. (In Tarkington v. United States Lines Co., 222 F2d 358, (CA 9th, 1955, wherein the Court held that a motion for a new trial should have been treated as a motion under Rule 60(b) to correct the mistake of the court. As a result of the deletion of the pro-

noun his, relief for mistake, inadvertence, etc. was extended to include not only the mistake of the moving party, but also the mistake of the adverse party, third person, and even the court." Moore's Federal Practice, 2nd ed. ¶60.22(3), p. 236). Treating the plaintiffs' motion as a motion under Rule 60(b) in order to give the relief prayed for, the district court had jurisdiction to grant the relief within the time prescribed in the rule, and the exercise of its power was not an abuse of discretion. It is a well settled doctrine that the court is to be presumed to have acted according to law than otherwise. The court decided this wise:

"The plaintiffs' motion for order to vacate and re-enter the judgment or order filed in the above-entitled cause having been given careful consideration, together with defendants' opposition thereto, also filed herein, it is by the court, this 17th day of February, 1964,

"ORDERED, That the plaintiffs' motion for order to vacate and re-enter judgment or order be, and is hereby, granted." (Underlining supplied).

As to the third request of plaintiffs in said motion, the court sayeth naught. Plaintiffs simply filed a Notice of Appeal. They did so on reliance of the district court's action or order vacating the judgment and re-entering it. There is nothing in the Rule 60(b) that he could not re-enter it. "On motion and upon terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding * * *" The court set aside the judgment for the plaintiffs, and re-entered it in the interest of the defendants, and in doing so merely cancelled the undue advantage gained by the defendants through their failure to send the notice of the judgment to the trial lawyer although they send ^{a copy} to the office of local counsel who was out of the country in such a lack of circumspection as to lead the attendant in the local office to assume that a copy of the notice of the

judgment must have been served on the trial counsel in Arizona. The terms by which the district court relieved the hapless plaintiffs was just, we submit.

Were the defendants under no duty to serve notice of the entry of the judgment, but undertook to do so, they were duty bound to perform the service with such circumspection and care that the plaintiffs or their counsel would get the notice of the judgment. In this case, the defendants' counsel had personal knowledge that plaintiffs' trial counsel appeared alone at the hearing, and argued the case alone, and litigated the cause at arm length and got personally acquainted, all around, with the defendants' counsel. It is reasonable and logical, therefore, under these facts, to send a notice of the judgment to the said trial counsel, and for the trial counsel to expect and to rely upon such a notice be served upon him by the adverse party.

The defendants, accordingly, caused or contributed to the mistake, inadvertence, excusable neglect, etc., for which plaintiffs had sought to have the judgment vacated and reentered. A third person or persons in the office of the absent local counsel in Washington, D.C. also may have contributed too, out of the natural and reasonable assumption that a copy of the notice of the judgment must have been served upon the trial lawyer in Arizona. Such mistakes, inadvertence, excusable neglect of other persons, the adverse party, or even the court, were contemplated in the amendment to Rule 60(b), and in no other rule of procedure. The Advisory Commit-

tee on Rules, in the 1946 revision of Rule 60(b), in deleting the pronoun his, in the Notes, stated: "In 1946, the Committee

"The qualifying pronoun "his" has been eliminated on the basis that ^{it} is too restrictive and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc." (Committee Note of 1946 to Rule 60(b), Moore's Federal Practice, 2nd ed. vol. 6, in ¶60.01(9) at p. 4011).

The motion to vacate and set aside the judgment and re-enter it, was made four months and four days after the judgment or order was entered or taken, and the order granting the motion was made four months and 18 days. The motion was filed directly on plaintiffs' learning of the entry of the judgment and within a reasonable time. (Joint Appendix, the affidavits, pp. 76 - 79).

The record in this case contains facts, more than contained in Harris Truck Lines v. Cherry Meat Packers, beyond the apparent hardship to the appellant miners for which the Supreme Court suggested great deference be given by the reviewing court, in which the Court says:

"* * * Whatever the proper result in the initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling. The judgment is vacated and the case is remanded to the Court of Appeals so that petitioner's appeal may be heard on its merits."

The same consideration for the "unique circumstances" were found by the Supreme Court in Thompson v. Immigration & Naturalization Service as to evoke the opinion that that "instant cause fits squarely within the letter and spirit of Harris."

II

The amendment of Rule 77(d), which was to have, in effect overruled *Hill v. Hawes*, 320 U.S. 520 (1944), which the Court

regarded to have done, has not precluded the relief of a party from a final judgment on a motion treated as under 60(b) and the same re-entered to permit indirectly, in order to effect substantial justice and to prevent judgments from becoming instruments of oppression, the hapless party to pursue an appeal on the merits. If such amendment closed the door to an indirectly extending the time for an appeal, by Rule 77(d), in the Hill v. Hawes opinion, it did not bar the other door opened by the Supreme Court in the same opinion, wherein the Supreme Court says:

"* * * The Federal Rules of Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. (See Rule 60(a)(b).). These rules do not apply to the situation here present, as the court below held. But we think it was competent for the trial judge * * * and in the exercise of a sound discretion, to vacate the former judgment and to reenter a new judgment of which notice was sent in compliance with the rules. The term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the case."

Instead of barring this door, the Advisory Committee on Rules, in the amendment of Rule 60(b) opened wide the door, deleting restrictive matters, and extending the time within which a motion for relief from a judgment may be filed on any of six reasons specified in the amended rule, including the catch-all reason (6) for "any other reason justifying relief from the operation of the judgment." Under this reason (6), "in the interest of justice" would, we believe, go in, as well as a court's prophylactic measure in preventing a party/taking advantage of the local-trial counsel, (far apart from each other) arrangement, which may develop into a tricky instrument in getting the better of another party by exploiting the likelihood of a notice's getting snagged some-

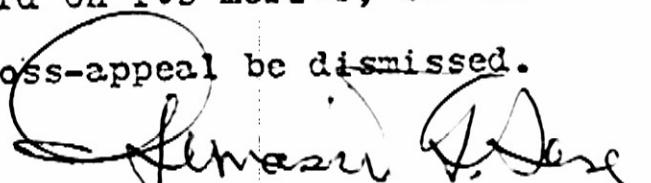
where down the incidents of transmission.

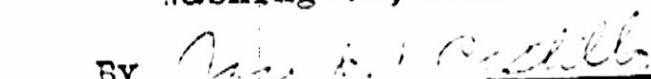
In this case, the local attorney had left the country prior to the setting and notice of the hearing of the defendants' motion for summary judgment, and defendants had adequate opportunity in discovering his absence; the trial lawyer duly received the notice of the hearing in the district court, made the trip to Washington, D.C. and appeared and argued the case. Defendants' counsel then gained personal knowledge of who the trial lawyer was and actually handling the case, and who, of the counsel, was their actual adversary in this litigation. It is reasonable, therefore, in the circumstances, in the ordinary course of human affairs and of business transaction, for the said trial lawyer to be given notice of the judgment and for him to expect such notice. It is reasonable to rely upon such a belief, and said trial lawyer did rely on such belief and expectation that defendants should give him notice. Defendants undertook to send the notice, and to an empty office in Washington, D.C., but not a copy to the trial counsel and thereby failed him.

The dominant policy of the Supreme Court evident in the cases above cited, it seems, in the face of the rules of procedure and the strictures given to them, is the dispensing of "substantial justice", and notwithstanding the amendments referred to designed to counteract the Supreme Court decisions, enlightened courts, since after the amendments to Rules 77 and 73(a) subscribe to the Supreme Court's policy of rendering substantial justice. (Tar-kington v. U.S. Lines Co. (CA 2d, 1955) 222 F2d 358; Resnick v. Lehigh Valley R. Co. (SD NY 1951) 15 F R Serv. 73a.54, case 1, wherein confusion between attorney of record and trial counsel with respect to notice of entry of judgment was a showing of

"excusable neglect" and the court held that the plaintiff should not be deprived of an opportunity to appeal; and various cases, on one thing or another).

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the order of the district court setting aside the judgment granting the defendants summary judgment and re-entering it be affirmed, and that Appellants' appeal be heard on its merits, in the interest of justice, and that the cross-appeal be dismissed.


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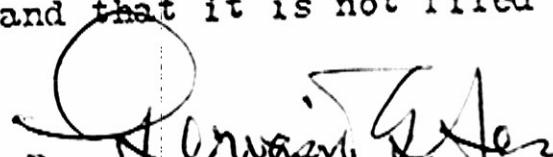
By 
JOSE DEL CASTILLO, Esq.
99 South Church Avenue
Tucson, Arizona;
Of Appellants' counsel.

CERTIFICATE OF COUNSEL

I, JOSE DEL CASTILLO, of counsel for Appellants, do hereby certify that the foregoing petition for a hearing of this cause is presented in good faith and not for purposes of delay.

JOSE DEL CASTILLO
99 South Church
Tucson, Arizona

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to a favorable consideration of the Court and that it is not filed for the purpose of delay.

By 
SESE & LOPEZ, Attorneys
of Record